UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 08-13555(JMP) and 08-01420(JMP)(SIPA)

Adv. Case Nos. 09-01177 and 09-01178

- -x

In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.,

Debtors.

- -x

In the Matter of:

LEHMAN BROTHERS INC.,

Debtor.

- -x

LEHMAN BROTHERS HOLDINGS, INC./

LEHMAN BROTHERS SPECIAL FINANCING, INC.,

Plaintiff,

-against-

LIBRA CDO, LTD.,

Defendant.

- -x

(cont'd. on next page)

U.S. Bankruptcy Court

One Bowling Green

New York, New York

August 26, 2009

10:04 a.m.

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

CASE CONFERENCE

HEARING re Debtors' Motion to Engage Citadel Solutions LLC on an Interim Basis [Docket No. 4717]

HEARING re Motion of Lehman Brothers Holdings Inc., et al. for Authorization and Approval of Settlement with Lehman Re Ltd. [Docket No. 4716]

HEARING re Debtors' Motion for Authorization to Implement Alternative Dispute Resolution Procedures for Affirmative Claims of Debtors Under Derivative Contracts [Docket No. 4453]

HEARING re Debtors' Motion for an Order Enforcing the Automatic Stay and Holding Shinsei Bank in Contempt for Violating the Automatic Stay [Docket No. 4764]

RE: SIPC PROCEEDINGS:

HEARING re Second Application of Hughes Hubbard & Reed LLP for Allowance of Interim Professional Compensation for Services Rendered and Reimbursement of Actual and Necessary Expenses Incurred from February 1, 2009 through May 31, 2009 [Docket No. 1292]

HEARING re Unclaimed Property Recovery Service's Motion for Orders (A) Compelling Payment of Unclaimed Funds by the New York State Comptroller, (B) Lifting the Automatic Stay, or, Alternatively, Providing Relief from the Automatic Stay, (C) Allowing Payment for Services Provided Postpetition and (D) Other Relief [Case No. 08-13555, Docket No. 3345]

RE: ADV. CASE NOS. 09-01177 AND 09-01178:
HEARING re Motion for Summary Judgment; Defendant's Cross-Motion for Summary Judgment

Transcribed by: Clara Rubin
Penina Wolicki

A P P E A R A N C E S :

WEIL, GOTSHAL & MANGES, LLP
Attorneys for Debtors
767 Fifth Avenue
New York, NY 10153

BY: RICHARD P. KRASNOW, ESQ.
PETER GRUENBERGER, ESQ.
ROBERT J. LEMONS, ESQ.

WEIL, GOTSHAL & MANGES, LLP
Attorneys for Plaintiffs/Movants Lehman Brothers Holdings, Inc. ("LBHI") and Lehman Brothers Special Financing, Inc. ("LBSF")
1300 Eye Street, N.W.
Suite 900
Washington, DC 20005

BY: RALPH I. MILLER, ESQ.

WEIL, GOTSHAL & MANGES, LLP
Attorneys for Plaintiffs/Movants Lehman Brothers Holdings, Inc. ("LBHI") and Lehman Brothers Special Financing, Inc. ("LBSF")
700 Louisiana
Suite 1600
Houston, TX 77002

BY: SCARLETT E. COLLINGS, ESQ.

ALLEN & OVERY, LLP
Attorneys for Public Bank Berhad
1221 Avenue of the Americas
New York, NY 10020

BY: JOHN KIBLER, ESQ.

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Attorneys for Goldman Sachs
One Liberty Plaza
New York, NY 10006

BY: LISA M. GOULDY, ESQ.

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Attorneys for SEK, BBVA, PB, Goldman, Wachovia, DE Shaw
One Liberty Plaza
New York, NY 10006

BY: SEAN A. O'NEAL, ESQ.

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Attorneys for Barclays Capital, Inc.
One Liberty Plaza
New York, NY 10006

BY: LUKE A. BAREFOOT, ESQ.

CLIFFORD CHANCE US LLP
Attorneys for Barclays Capital Inc.
31 West 52nd Street
New York, NY 10019

BY: SARA M. TAPINEKIS, ESQ.

DECHERT LLP
Attorneys for Russell Investments
1095 Avenue of the Americas
New York, NY 10036

BY: GLENN E. SIEGEL, ESQ.

EDWARDS ANGELL PALMER & DODGE LLP
Attorneys for MDFA/Beaver Country Day School
750 Lexington Avenue
New York, NY 10022

BY: PAUL J. LABOV, ESQ.

DEWEY & LEBOEUF, LLP
Attorneys for Royal Bank of Scotland, and Affiliates
1301 Avenue of the Americas
New York, NY 10019

BY: MARTIN J. BIENENSTOCK, ESQ.

GENOVESE JOBLOVE & BATTISTA P.A.
Attorneys for Wong Movants
200 East Broward Boulevard, Suite 1110
Fort Lauderdale, FL 33301

BY: ROBERT F. ELGIDELY, ESQ.

GREENBERG TRAURIG, LLP
Attorneys for Florida Power & Lighting
MetLife Building
200 Park Avenue
New York, NY 10166

BY: DAVID Y. WOLNERMAN, ESQ.

HUGHES HUBBARD & REED LLP
Attorneys for the James W. Giddens, SIPA and SIPC Trustee
One Battery Park Plaza
New York, NY 10004

BY: JEFFREY S. MARGOLIN, ESQ.
JAMES B. KOBAK JR., ESQ.
DAVID W. WILTENBURG, ESQ.

HUNTON & WILLIAMS LLP
Attorneys for Gaselys
200 Park Avenue
New York, NY 10166

BY: SCOTT H. BERNSTEIN, ESQ.

JENNER & BLOCK LLP
Attorneys for the Examiner
One IBM Plaza
330 N. Wabash Avenue
Chicago, IL 60611

BY: ROBERT L. BYMAN, ESQ.
ANTON R. VALUKAS, ESQ.

KUTAK ROCK LLP
Attorneys for the Nebraska Investment Finance Authority
Bank of America Center
1111 East Main Street, Suite 800
Richmond, VA 23219

BY: JEREMY S. WILLIAMS, ESQ.

LINKLATERS LLP
Attorneys for Joint Administrators of the Lehman European Group Administration Companies
1345 Avenue of the Americas
New York, NY 10105

BY: MARTIN N. FLICS, ESQ.

LOWENSTEIN SANDLER PC
Attorneys for: 1) Fiat Choice Power, LP, 2) Option Energy Marketing & Trading, LLC; and 3) Reliant Energy Power Supply, LLC
1251 Avenue of the Americas
New York, NY 10020

BY: S. JASON TEELE, ESQ.

LOWENSTEIN SANDLER PC
Attorneys for: 1) Fiat Choice Power, LP, 2) Option Energy Marketing & Trading, LLC; and 3) Reliant Energy Power Supply, LLC
65 Livingston Avenue
Roseland, NJ 07068

BY: MICHAEL S. ETKIN, ESQ.

MAYER BROWN LLP
Attorneys for Libra CDO, Bank of America and Societe Generale
1675 Broadway
New York, NY 10019

BY: CHRISTOPHER J. HOUPT, ESQ.
STEVEN WOLOWITZ, ESQ.

MILBANK, TWEED, HADLEY & MCCLOY, LLP
Attorneys for the Official Committee of Unsecured Creditors
One Chase Manhattan Plaza
New York, NY 10005

BY: DENNIS C. O'DONNELL, ESQ.
DENNIS F. DUNNE, ESQ.
EVAN R. FLECK, ESQ.

MILBANK, TWEED, HADLEY & MCCLOY, LLP
Attorneys for the Official Committee of
Unsecured Creditors
International Square Building
1850 K Street, NW
Washington, DC 20006

BY: DAVID S. COHEN, ESQ.

MORITT HOCK HAMROFF & HOROWITZ LLP
Attorneys for The Hutchkiss School
400 Garden City Plaza
Garden City, NY 11530

BY: THERESA A. DRISCOLL, ESQ.

O'MELVENY & MYERS LLP
Attorneys for Oceania Cruises Inc.
Times Square Tower
7 Times Square
New York, NY 10036

BY: SHANNON LOWRY NAGLE, ESQ.

PATTERSON BELKNAP WEBB & TYLER LLP
Attorneys for the Asbury Parties
1133 Avenue of the Americas
New York, NY 10036

BY: DAVID W. DYKHOUSE, ESQ.
BRIAN P. GUINEY, ESQ.

PAUL BATISTA, P.C.
Attorney for Unclaimed Property Recovery Service, Inc.
26 Broadway
Suite 1900
New York, NY 10004

BY: PAUL BATISTA, ESQ.

PILLSBURY WINTHROP SHAW PITTMAN LLP
Attorneys for Embarcadero Aircraft Securitization Trust
1540 Broadway
New York, NY 10036

BY: RICK B. ANTONOFF, ESQ.

QUINN EMANUEL URQUHART OLIVER & HEDGES LLP
Conflicts Counsel to the Official Creditors' Committee
865 S. Figueroa Street
10th Floor
Los Angeles, CA 90017

BY: ERIC WINSTON, ESQ.

QUINN EMANUEL URQUHART OLIVER & HEDGES LLP
Conflicts Counsel to the Official Creditors' Committee
51 Madison Avenue
22nd Floor
New York, NY 10010

BY: DANIEL P. CUNNINGHAM, ESQ.

SHEARMAN & STERLING LLP
Attorneys for Bank of America and Merrill Lynch
599 Lexington Avenue
New York, NY 10022

BY: NED S. SCHODEK, ESQ.

SHEARMAN & STERLING LLP
Attorneys for Nomura International plc
599 Lexington Avenue
New York, NY 10022

BY: SOLOMON J. NOH, ESQ.

STROOCK & STROOCK & LAVAN LLP
Attorneys for Various Derivative Counterparties
180 Maiden Lane
New York, NY 10038

BY: CLAUDE G. SZYFER, ESQ.

SULLIVAN & CROMWELL LLP
Attorneys for Defendant Barclays Bank PLC
125 Broad Street
New York, NY 10004

BY: ROBINSON B. LACY, ESQ.

VINSON & ELKINS LLP
Attorneys for Shinsei Bank
666 Fifth Avenue
26th Floor
New York, NY 10103

BY: DENIS F. CRONIN, ESQ.
J. RONALD TROST, ESQ.
DOV R. KLEINER, ESQ.

WHITE & CASE, LLP
Attorneys for Ad Hoc Group of Creditors
1155 Avenue of the Americas
New York, NY 10036

BY: J. CHRISTOPHER SHORE, ESQ.
LISA THOMPSON, ESQ.

U.S. DEPARTMENT OF JUSTICE
Office of the United States Trustee
33 Whitehall Street, 21st Floor
New York, NY 10004

BY: ANDREW D. VELEZ-RIVERA, ESQ.

SECURITIES INVESTOR PROTECTION CORPORATION
805 15th Street, N.W.
Suite 800
Washington, DC 20005

BY: KENNETH J. CAPUTO, ESQ.

TELEPHONIC APPEARANCES:

ALSTON + BIRD, LLP
Attorneys for Creditor, Bank of America
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309

BY: WILLIAM S. SUGDEN, ESQ. (TELEPHONICALLY)

BERNSTEIN, SHUR, SAWYER & NELSON, P.A.
Attorneys for Trustee, Citibank, N.A.
100 Middle Street
West Tower
Portland, ME 04101

BY: MICHAEL A. FAGONE, ESQ. (TELEPHONICALLY)

CHAPMAN & CUTLER LLP
Attorneys for Creditor, US Bank, N.A.
111 West Monroe Street
Chicago, IL 60603

BY: JAMES HEISER, ESQ. (TELEPHONICALLY)
FRANKLIN H. TOP, III, ESQ. (TELEPHONICALLY)

COLEMAN LAW FIRM, P.C.
Attorneys for Creditors, Schoellhorn Trust
The Chambers - The 48th Floor
77 West Wacker Drive
Chicago, IL 60601

BY: STEVE JAKUBOWSKI, ESQ. (TELEPHONICALLY)

FELDERSTEIN FITZGERALD WILLOUGHBY & PASCUZZI LLP
Attorneys for Creditor, CalPERS
The Wells Fargo Center
400 Capitol Mall, Suite 1450
Sacramento, CA 95814

BY: HOLLY A ESTIOKO, ESQ. (TELEPHONICALLY)

POLSINELLI SHALTON FLANIGAN SUELTHAUS PC
Interested Party
700 W. 47th Street, Suite 1000
Kansas City, MO 64112

BY: DANIEL J. FLANIGAN, ESQ.

STUTMAN, TREISTER & GLATT PC
Attorneys for Interested Party, Elliott Co.
1901 Avenue of the Stars
12th Floor
Los Angeles, CA 90067

BY: JEFFREY H. DAVIDSON, ESQ. (TELEPHONICALLY)
MARINA FINEMAN, ESQ. (TELEPHONICALLY)
WHITMAN L. HOLT, ESQ. (TELEPHONICALLY)

STUTMAN, TREISTER & GLATT PC
Attorneys for Creditor, Perry Capital
1901 Avenue of the Stars
12th Floor
Los Angeles, CA 90067

BY: MARINA FINEMAN, ESQ. (TELEPHONICALLY)

WHYTE HIRSCHBOECK DUDEK S.C.
Attorneys for Creditor, Metavante Corporation
555 East Wells Street, Suite 1900
Milwaukee, WI 53202

BY: BRUCE G. ARNOLD, ESQ. (TELEPHONICALLY)

THE BAUPOST GROUP
Interested Party
10 St. James Avenue
Suite 1700
Boston, MA 02116

BY: MEGHAN S. MICHELS, ESQ. (TELEPHONICALLY)

CREDIT SUISSE FIRST BOSTON
Interested Party

BY: ANDREW REBAK (TELEPHONICALLY)

P R O C E E D I N G S

THE COURT: Be seated, please. Good morning.

MR. KRASNOW: Good morning, Your Honor. Richard Krasnow, Weil, Gotshal & Manges, on behalf of the Chapter 11 debtors. Your Honor, if it's acceptable to the Court, I would propose that we deal with the matters on today's calendar in the order in which they appear on the agenda that was filed with the Court yesterday?

THE COURT: That's the right way to do it.

MR. KRASNOW: Thank you, Your Honor. Going to the uncontested portion, there is indeed one, on today's calendar. The first item, Your Honor, is a status report by the examiner.

MR. VALUKAS: Good morning, Your Honor.

THE COURT: Good morning.

MR. VALUKAS: Anton Valukas. I'm glad I'm on the uncontested part of the agenda.

THE COURT: At least today.

MR. VALUKAS: Your Honor, Mr. Byman informed the Court, I think about a month ago, that I would be making a status report, and I'm here to make that report today. When I was first appointed by Your Honor in mid-February, I indicated I believed the report could be completed by and within nine months, which put us to somewhere in the middle of November. That will not be my estimate as of today.

I'm here to advise you that we will have this report

to the Court on or before February 1st. And I'd like to explain to you how it is we got there. I have had an opportunity speaking with counsel for a number of the parties prior to today, just to give them the information on this new date. But essentially, what's taken place is this. At the time I made my estimate, I made the assumption that with the parties involved and the fact that this matter had been on the Court's docket for some time, that the files and documents would have been organized in a fashion that we could have answered some of the questions with some speed.

It turns out that that really is not the case. The parties were appropriately focused on certain issues, not on other issues. The documents were scattered among several different systems which were, in some respects, incompatible. So there were technical issues about how we could gather them once we even had access to them and the appropriate protective orders in place. That's no one's fault, it's just a fact of life, a logistics fact of life.

We initially estimated that we would be looking at approximately a million or a million and a half pages from the various documents that would be involved for purposes of doing the analysis and interviewing approximately a hundred witnesses. We were looking at Enron and some of the other cases as a template for that type of report. To date we have reviewed over 10 million pages. We will review the rest of

what need to get, assuming that we have no problems, and we don't expect to have problems, within the next forty-five days. So it was considerably more material necessary to be reviewed to give a fair analysis of what was taking place. And a large part of what's involved here is nuance-driven, so looking at the documents is critical to preparing a report which is both accurate and fair to all the parties.

We've interviewed over ninety-five witnesses to date. We will complete the interviews by the end of September, in to early October. We expect another sixty individuals who are key to this and who have been identified, either by the party or by the documents, as necessary for purposes of completing the report.

There has been remarkably good cooperation from the parties. There's been pushback in some instances. We've only had to issue several -- we've issued some subpoenas, but very few, considering the nature of this case. And in each instance, after the matter had been fully briefed, the materials that we had requested were produced without the necessity for contested hearings. So we feel that we're getting the documents we need to complete the report.

We've coordinated with the government. We either meet with or speak with the three U.S. Attorneys and the SEC on a weekly basis and exchange the information that they feel necessary to have exchanged. So that coordination has taken

place. We've met with the SIPA trustees and their counsel in connection with this matter. We have given them access to all of the interviews that we've done as we've done them, so as to avoid replication. And to the extent that assists them, that is good. We have shared with them the documents we have received. They have shared with us their database and the materials they have received, which I think has had a significant impact in both shortening the investigation and reducing the cost.

We have, as I think the Court knows, used contract attorneys, because of the multiple millions of dollars -- or millions of documents. Our estimate, which we shared with the Trustee, is that it's saved the estate tens of millions of dollars to date over the fees that otherwise might have been incurred using usual law firm rates.

So, that's where we are. The other reason for the necessity in taking these additional two and a half or three months to complete is that, obviously, one of the things the Court has charged us in the order with resolving is individual liability and the liability of various institutions as it may or may not exist in connection with this case. And it is imperative, in my view, that we make sure the parties have given us all the facts necessary for me to reach those conclusions before giving a report to the Court.

So all that being said, I feel comfortable that we

will have this report to you on or before February 1st.

THE COURT: All right. Thank you for the report. And is there anything you wish to add?

MR. VALUKAS: None at this point. Not until I come back with the report.

THE COURT: Fine.

MR. VALUKAS: Thank you.

THE COURT: Thank you very much, sir.

MR. VALUKAS: Your Honor, with the Court's permission, I would excuse myself, if I may?

THE COURT: You may excuse yourself. And if you or anybody else would like to watch the proceedings from Room 608, that room is available.

MR. VALUKAS: Okay. Thank you.

MR. KRASNOW: Richard Krasnow, Weil Gotshal, for the Chapter 11 debtors. Your Honor, the next item on the uncontested portion of today's hearing is the debtors' motion to engage Citadel Solutions LLC on an interim basis.

Your Honor, as set forth in the motion, Citadel is being engaged by the debtors to provide certain back office and infrastructure assistance to the debtors in connection with work that they need to perform. There were no objections filed in connection with the motion. However, after the filing of the motion, based on discussions had with the committee, there were certain modifications made to the proposed interim

agreement, as well as modifications to the form of the proposed order approving this engagement.

For that reason, the debtors filed a supplement to the motion on August 24th, which both describes the changes that are proposed to be made to the interim agreement and also attached to it a black-line version of the agreement to reflect those changes and a black-line of the proposed order reflecting changes.

There have been no objections filed in respect of that supplement. And therefore, Your Honor, for the reasons set forth both in the motion and the supplement, we would request that the Court grant the relief sought.

THE COURT: Do you wish to identify for the record any of the changes that were made?

MR. KRASNOW: Your Honor, as indicated in the supplement, the changes in the revised agreement eliminate caps on damage claims that could otherwise be asserted against Citadel for breach of confidentiality. It also provides that neither LBHI nor Citadel shall be liable for any speculative, exemplary, punitive, indirect or consequential damages relating to or arising under the revised agreement. But actual damages would be the nature of the claims that could be asserted. Those basically are the changes, Your Honor.

THE COURT: With no objections, the modifications seem reasonable, and I approve the motion.

MR. KRASNOW: Your Honor, at the conclusion of today's hearing, we'll provide chambers with the appropriate disks with respect to the orders.

THE COURT: Fine.

MR. KRASNOW: Your Honor, the next and last uncontested matter on today's calendar relates to LBHI's motion for authorization and approval of the settlement with Lehman Re, an entity that has, in fact, filed a petition with this Court for relief under Chapter 15. The settlement, which relates to issues regarding ownership of certain loans, is described in the motion itself. There have been no objections filed with respect to the motion, and the only reason that a certificate of no objection was not filed was because there was a request by the LBI trustee that there be an additional paragraph be included in the proposed order making it clear that nothing in the settlement order, assuming Your Honor approves it and enters it, would prejudice rights which they have.

Your Honor, I have a black-line version of the proposed order which I could share with the Court.

THE COURT: Why don't you?

MR. KRASNOW: If I may approach?

THE COURT: Please. Thank you. I've reviewed it. It looks fine.

MR. KRASNOW: Your Honor, for the reasons set forth in

the motion and given the fact that there were no objections, we would request that the Court approve the settlement and enter the order as modified.

THE COURT: The settlement is approved. And I will enter the order in its modified form.

MR. KRASNOW: Thank you, Your Honor. Your Honor, we now turn to the reason why this courtroom is crowded today. We'll do the contested matters. The first matter on the calendar, contested matter, relates to the proposed alternative dispute resolution procedures proposed by the debtors. And I turn the rostrum over to my partner, Mr. Gruenberger.

MR. GRUENBERGER: Good morning, Your Honor. Peter Gruenberger, Weil, Gotshal & Manges, for the debtors.

THE COURT: Good morning.

MR. GRUENBERGER: Our motion requests the Court to order implementation of a set of alternate dispute resolution procedures, including mediation, governing derivatives contracts in the money to the debtors. No one can seriously question, Your Honor, that dealing with the vast number and considerable complexity of the derivatives contracts here presents a challenge, a challenge for all the important constituents in these cases: the debtors, all derivatives counterparties, indenture trustees, the unsecured creditors' committee, and above all, the Court.

The challenge is to come up with a workable process

apart from the filing and prosecution of hundreds of adversary proceedings, one that offers a reasonable alternative for resolution of disputes that surely will impact many of the 6,000 or more derivatives contracts under which the debtors had more than 900,000 transactions with hundreds of different counterparties.

We believe that in conjunction with the creditors' committee, we have succeeded in presenting a feasible and fair ADR process. It goes without saying, Your Honor, that debtors have a fiduciary duty to maximize the value of their assets embodied in the derivatives contracts in a manner that promotes expedition, avoids unnecessary costs and waste of resources, and at the same time, reduces burdens on an already burdened Court. Reliance wholly on adversary proceedings virtually guarantees such draconian outcomes.

Our proposed ADR procedures do just the opposite. One may ask, will our mediation proposal eliminate all adversary proceedings? No. It will not. But these ADR procedures demonstrably fall within the acceptable range of reasonableness, a path that promises to reduce the number and variety of adversary proceedings that are certain to swamp this Court's calendar for years to come, in the absence of an ADR process. Are debtors' ADR procedures including mediation a perfect fix, where one size fits all? No. They are not perfect, because there are just too many and too diverse a

population of complex transactions, contracts and issues that would permit a perfection.

One example only suffices to demonstrate the schizophrenia exhibited by objectors in their attack on these ADR procedures. One segment of them argues that the Court lacks power to order mediation in the absence of a pending adversary proceeding, while another segment argues simultaneously that the Court should refrain from ordering mediation for any dispute that is or may become the subject of an adversary proceeding. No set of procedures, Your Honor, could be crafted to satisfy such contradictory positions.

In an atmosphere where objectors clamor for a personalized, hand-tailored process that takes into account only their particular needs, nothing could make every party-in-interest happy. In this prevailing climate of NIMBY, not in my back yard, no perfect fix is possible; and impossible, also, where parties feel, without constraint, to file unauthorized surreplies last night, as one did after 6 p.m., to place phone calls later last night, and sending e-mails as late as this morning, as three objectors did, still seeking exclusion from the ADR procedures, for their own asserted special reasons.

One cannot create any system for these folks, much less a perfect one. But fortunately, Your Honor, perfection for everyone is not and cannot be the standard. In filing this motion and the initial proposed orders, debtors tried their

best, in conjunction with the creditors' committee, to fashion, from the outset, a reasonable set of procedures. And reasonableness not perfection is the test.

Starting promptly after we filed this motion on July 20th, debtors modified their initial proposed order that was attached to our motion four separate times in order to accommodate counterparties who took the time and made the effort to contact us with helpful suggestions. My declaration and Exhibits A, B and C attached thereto, which accompanies debtors' omnibus responses to the objections, details the specific efforts debtors undertook that resulted in the twenty-two or so negotiated modifications we made to the proposed orders, with the help of the committee and its constituents, reasonable counterparties. Our joint efforts led to many potential objectors to refrain from filing any objections and caused several objectors eventually to withdraw all the objections they filed.

These cumulative changes, Your Honor, are reflected in the revised proposed order, which is attached to debtors' omnibus response as Exhibit B. Debtors and the creditors' committee believe that this revised proposed order represents a compromise in the form of a well-balanced and fair set of procedures that does nothing to skew the ability of any party to negotiate and mediate its disputes, evenhandedly, on a level playing field with the debtors.

Mediation procedures similar to the ones we've proposed, Your Honor, were ordered by Judge Gonzalez in Enron and by Judge Gerber in Ames. In Enron, for example, the mediation of seventy-seven large derivatives contract disputes resulted in a settlement rate of one hundred percent. That brought into the Enron debtors' estates over 600 million new dollars, with respect to in-the-money claims, and resulted in the expungement of some 2.5 billion claims against the Enron debtors' estates.

So mediation really does work if, but only if, Your Honor, parties approach it with open minds. And we mean mediation as we propose it here, which includes: mandatory good-faith participation, with nothing binding unless settlement is reached voluntarily; utilization of respected mediators, not connected to any party; preservation of the rights and remedies of all parties which remain unaltered before, during and after mediation, even if settlement is not reached. The same rules and requirements will apply equally to all parties. Confidentiality will be maintained throughout. Mandatory attendance by principals with authority to settle will be required, but video conference attendance may be had. One hundred percent of mediators' fees will be borne by the debtors.

The remaining objections, Your Honor, were filed by about fifty counterparties. They should be overruled in toto

as they lack merit for many reasons. Debtors' omnibus response attaches as Exhibit A thereto a table of objections and rebuttals thereto in which we specifically rebut, one by one, each of the remaining objections. And our omnibus response rebuts category by category, the remaining objections.

I trust that Your Honor does not wish me to cover here each specific objection or even each category of objection and our rebuttals thereto? That could take days.

THE COURT: You're right. You're absolutely right. I don't want you to do that.

MR. GRUENBERGER: Thank you. And of course, I will endeavor to answer any questions Your Honor may have. But as to these remaining objections, I would note briefly, the objections contain certain fallacies, indeed, fatal flaws, that debtor highlight starting at paragraph 12 of our omnibus response. The primary inherent fallacy results in the failure of objectors to recognize that negotiation and mediation presents an opportunity, an opportunity to achieve cost-effective alternatives to litigation, which guarantees only long delay, huge cost, and added burden for Your Honor.

These flaws adhere in part on a misunderstanding of the Court's power to order mediation, and that's due to objectors' misreading of the standing mediation order, which is Amended General Order M-143, which governs in this district. Objectors also seem to be ignoring section 105(a) of the

Bankruptcy Code, which provides the Court with the inherent power to issue any order necessary or appropriate to carry out the provisions of Title 11, including control of its own docket and to order sanctions after notice and hearing. And we cite cases at paragraphs 10, 21 and 22 of our omnibus response to that effect.

In conjuring up every evil imaginable, some of these objectors also misread the proposed order itself. That order prejudices no party. No party's rights are adversely impacted by participating in ADR. No decisions are rendered by anyone. No party wins or loses in mediation, and no party or the mediator can force a settlement on any party.

Another underlying fallacy is the objectors' unfounded presumptions that debtors will act in bad faith. It is illogical of them, however, to presume that debtors will misuse mediation and thereby act contrary to their own best self-interest by willfully forcing needless litigation. No such bad faith does or will exist.

Another flaw involves objectors' belief that their views are infallible on questions of contract interpretation and application of the Bankruptcy Code, including the safe harbors. These misapprehensions result in objectors presumptuously placing on themselves the Court's robes, and in that guise, rejecting even the possibility that a competing interpretation of law or contract or a different view might

exist.

It is telling, Your Honor, that not one of these fifty-some-odd objectors has come up with a single alternative proposal for handling any of these complex matters other than adversary proceedings. So the objectors give Your Honor a clear invitation for you to now engage in premature mini-trials over every word in our ADR procedures. This is not, Your Honor, the proper time or place for hearing arguments and holding mini-trials on questions dealing with issues such as in personam jurisdiction, scope of the safe harbor, specific contract interpretation, indenture trustee authorization to settle and the like.

These issues should be mediated once the Court puts in place ADR procedures. Should debtors commence a mediation with respect to a counterparty or an indenture trustee, such issues should be raised in a response to an ADR notice which triggers a mediation. And if necessary, that party or trustee always has recourse, ultimately, to seek withdrawal from mediation, by application to the Court for cause shown, as permitted by the standing order. That is when issues of this sort would be ripe for determination by the Court upon an adequate record. That record does not exist today, and at this juncture, this Court should not hold mini-trials that these parties are demanding.

By the way, Your Honor, it's interesting to note that only fifty objections in a case involving 6,000 contracts is a

very, very small number. That I think reflects the reality that the vast majority of counterparties has no problem with these ADR procedures, as we propose them.

As to objectors' challenges to the participation rights of the creditors' committee in the ADR process, we will leave rebuttal on those matters to the committee, with whom we agree, and at whose responses to the objections we join.

Finally, Your Honor, as to the matter of mediators. Debtors are quite content to leave identification of specific mediators to the Court in the exercise of its sound discretion. Although we do suggest that the Court consider appointing three or four mediators in number in order to accomplish the salutary goals of our motion. Thank you.

THE COURT: I have a couple of --

MR. GRUENBERGER: Yes, Your Honor.

THE COURT: -- questions.

MR. GRUENBERGER: Certainly.

THE COURT: Obviously, the debtors and the creditors' committee have been involved in an ambitious endeavor and in an effort to come up with a set of procedures that will satisfy the particular needs of this case which are, perhaps, unique.

MR. GRUENBERGER: We agree, Your Honor.

THE COURT: It seems to me that the claims to be mediated are in a category that is, by most people's estimation, complicated, sophisticated and challenging. And I

certainly support the notion of the development of workable ADR procedures for dealing with these claims. That having been said, I'm not sure I agree with you that fifty objections represents a small number. It may be a small number in reference to the number of potential parties who might have objected, but it creates something of a difficult case management problem for right now.

I have a couple of questions as a result. One is, given the progress that the debtors have made as described in your omnibus response, and the various amendments that took place to the proposed form of order and to the procedures, is it your view that time's up at this point, and that today is the day when an order in the form that you have now developed it should be entered? Or is there some value in spending a little bit more time to try to accommodate some or all of the remaining objections that have not yet been resolved? That's a fundamental question that I have.

MR. GRUENBERGER: That is a fundamental and good question, Your Honor. And I would answer each of its parts as follows. Yes, I do think that time is up, only because of the nature of many of the objections. I do not think that I could negotiate with parties who say Your Honor has no power to order mediation. I do not think I can negotiate with parties who say Your Honor has no power to issue sanctions after notice and hearing if a party does not participate in mediation in good

faith, according to a mediator.

THE COURT: I can resolve those two points very quickly.

MR. GRUENBERGER: But that's only two, Your Honor.

THE COURT: I know, but I can tell you right now, I acknowledge that I: a) have the power to order mediation; you can do it, frankly, without an order. I can just, on my own -- all of this process that you have initiated is all well and good. I could, on my own, create my own monstrosity. I could simply say there shall be mediation, and it will follow the following format. And it may be the subject of some complaints, but I believe I have the power to do it. And I believe that General Order M-143 gives me that power on my own motion.

MR. GRUENBERGER: Agreed, Your Honor.

THE COURT: I also believe that I have the power to sanction. So as it relates to those two issues that have been bandied about, I can easily swat those down.

MR. GRUENBERGER: That only scratches the surface, Your Honor. I don't think I could -- or anybody -- could negotiate with people who say there's no dispute here. There's no dispute. We believe that we've paid exactly what we owe. So therefore, we're out of the ADR, right? And my response to that, as we put forth in our papers, is you're not infallible. You might be wrong. You might be right. We haven't scrubbed

every single one of these 900,000 transactions. Why don't you wait to see whether or not we do commence a mediation with respect to your contract, rather than carve you out without any record or any basis? The same for an indenture trustee who says I don't have settlement authority. Well, that may be right, it may not. I don't know, when there are hundreds of indenture trusts here and one indenture trustee says as to all of them, in a brief, there's no settlement authority.

Well, if that's so, the ADR process that we propose, Your Honor, allows that response to be made, and if so, we will investigate it. But we can't, in advance, know everything and rebut every one of these characterizations -- that's all they are today. And today certainly is not, and I repeat, and I don't like to repeat what I've said before, today is not the day to have mini-trials on all of these issues.

From in personam jurisdiction, no authority to settle, sure, we might negotiate, as we did prior today. Well, two days' notice or four days' notice, yes. But that's a small, small, small tip of the iceberg. The iceberg is huge because the category of contracts is huge; the number of parties is huge. And rather than fight over every word in advance, when we don't have the facts, and we're not going to have mini-trials over these facts, as Your Honor's indicated, we're not going to do that either, what do we do? I don't believe the nature of these allows for that kind of negotiation.

The creditors' committee and we, together, handled scores of calls and e-mails. We tried our best. The nature of the objections, as set forth in our table, indicates to Your Honor great diversity of problem-raising. It's very easy to raise problems now, but I think it's much easier, rather than try to resolve all of those in advance, to start the process. Because we'll be here with the shape of the -- this is like negotiating with foreign powers. They will spend days, hours, months, years, negotiating the shape of the table, and never get to it. Let's start lunch at the table.

THE COURT: It's a little early for lunch, but I understand --

MR. GRUENBERGER: Your Honor, I've tried to answer your question the best way I can.

THE COURT: And you have. I understand the point. But what I was actually driving at in part is timing. It's August 26th --

MR. GRUENBERGER: Yes.

THE COURT: -- a time when civilized societies are at the beach.

MR. GRUENBERGER: And the French as well as civilized people.

THE COURT: And we're here. We're here in a reasonably well-air conditioned room for a change. And the question that arises is why does this have to happen today?

Why does this have to happen before Labor Day? The examiner just gave a status report on timing. He indicated he needs more time. It's a big job that he has and he looked for -- not that I had a problem listening to it -- he looked for more time to complete a herculean task.

In some respects this is a herculean task too, it's just a different sort of task. It's designing a structure that will be flawed, that will include imperfections of one sort of another, that will not satisfy everyone, and that can only really be tested in practice.

MR. GRUENBERGER: Agreed.

THE COURT: The reason I ask the timing question is that we achieved something of value in the context of the proof of claim process that was highly litigated in this case as it related to derivative questionnaires by encouraging parties to meet and confer. It happened in a relatively brief period of time. And various adjustments resulted from that which may not, again, be perfect, but which I think resulted in a general improvement in the overall content of the questionnaire and the procedures applicable to it.

And so I have a lingering question as to whether there would be any harm -- and I'm simply asking the question, I'm not encouraging the result -- would there be any harm if this matter were put off to the next omnibus hearing, not for purposes of delaying the process of implementing ADR, as much

as for the process of improving the overall structure of the ADR order? And what I'm trying to get a sense of, and I realize that you've answered the question for the debtors, indicating that while there might be some tweaking around the margins, as to the substance, you believe that the remaining objectors are -- not your word, mine -- obdurate --

MR. GRUENBERGER: I would say dug-in.

THE COURT: -- dug-in. Okay. Both those terms apply. That they're tenacious, and in your view, not particularly well-reasoned. And I'm not characterizing them. I'm just saying that that's -- you view that you're kind of narrowed down to the stubborn, hardcore, that you can't move, and that you're not going to accommodate any further anyway. Is that really where we are? Or are we at a point where some of those stubborn folks, having heard what I have to say, which is there will be ADR, and it will look an awful lot like exactly what you have come up with, if not be exactly that, but I'm willing to give some people a chance to deal with their special situations, so as to avoid mini-trials later. Because, candidly, it doesn't do me that much good to rubber stamp a set of procedures that I know are going to be objected to in the future, and end up with a whole bunch of litigation of parties saying I opt out for the following reason, I opt out for another reason. And I have a docket which is crowded with ADR opt-outs. That's not good either. And I don't know if that's

a realistic risk or not, but I'm concerned about it.

MR. GRUENBERGER: Your Honor, I was not -- well maybe I was born yesterday, but not late last night. So I will certainly not stand in front of the firing squad and say that today is the magic day, no other day works. Certainly there is nothing magical inherent in today as opposed to September 15th, which I think is the next omnibus date.

But I have a suggestion, Your Honor. And that involves, if Your Honor will bear with me for a moment, and hearing from the committee, because I think their views are important. I've told you my views on behalf of the debtors. I think there are many objectors here. If you're suggesting that they come up and argue their position or you're suggesting they come up -- and maybe you should just ask them whether they think that their objections could be negotiated away in the next two and a half weeks. I'm not going anywhere on vacation, so I'll be ready, willing and able to do it. But I don't know if they are. And maybe you should ask them.

THE COURT: Well, let's do the following. Most of my questions were rhetorical. I'm interested in hearing from the creditors' committee and to get the view of the committee as to whether additional time might be useful. If it is the considered view of both the debtor and the committee that there would be little purpose served in delay, then we won't delay, unless there are parties-in-interest who represent objectors

who come forward and tell me in sufficient numbers that more time could resolve their objections and lead to a better result.

If the answer is that more time could lead to a better result, we should take more time. If the answer is that more time is a waste of time, we should resolve it today.

MR. GRUENBERGER: I'm all right with that, Your Honor, definitely.

THE COURT: Let's hear from the committee.

MR. COHEN: Good morning, Your Honor. David Cohen with Milbank, Tweed, Hadley & McCloy here, on behalf of the committee.

To go directly to the Court's question as to whether more time may help, we think that there may be some value on the margins. A lot of the objections go to the timing issue and whether it should be twenty days or thirty days or seven days or fourteen days. And I think we could have further discussions that may be productive and may resolve those objections.

I think, as long as we have, from the Court -- what I understand the Court to be saying is that there will be ADR in some form; that the ADR will be mandatory; and that the Court has the power to issue sanctions. That gets us a long way in moving forward with resolving some of these objections.

THE COURT: I'm saying all those things.

MR. COHEN: Correct. The other issue that I think the Court should address today, is that there's a role for the committee to play. There are certain objections that seek to exclude the committee. As part of the process of getting here, we've worked with the debtors for months to come up with what we think are fair and balanced procedures. But reasonable minds can differ. But under the proposed order, there are different ways that a resolution could be settled without further involvement of the Court, one of which is the December procedures order, another is the January procedures order, both of which contemplate the committee's involvement. If the committee were excluded from the mediation process wholesale, then there runs the issue of 9019s in the hundreds coming before the Court. We think that that undermines the goal of minimizing the burden on the Court.

THE COURT: Okay. Thank you.

MR. COHEN: Thank you.

THE COURT: Now, we have a fairly crowded courtroom. And this is not an open casting call. This is rather a request that if there are parties who have been active in this process and who have objected who believe that it is not going to be useful to provide some more time to try to accommodate, I'd like to hear from only that subset, those who believe that the objections that have been raised are objections that are so fundamental that timing is not -- they can't be resolved with

some more time.

Fine. I think there should be some more time. And I think that it -- I think it makes sense for this to be put over either to the next omnibus hearing date, or alternatively, to find a time prior to the next omnibus hearing date, or after it -- I'm not wedded to September 15th, but prior to may be desirable, just an afternoon when I may have some time available -- for purposes of just bringing this matter to the Court's attention. That way, if there are ongoing resolved objections, there will be, in effect, a pure ADR day in which people who wish to be heard will have an opportunity to be heard, and other matters on the omnibus list will not be affected in the sense of having to wait while listening to matters that they may not be concerned with.

So, I'm suggesting that we either put this off to the 15th or to some day, if I can find it on my calendar, right before then, so that we can have a time that's just about ADR issues.

MR. GRUENBERGER: Your Honor, may I ask three clarifying questions, please?

THE COURT: Sure.

MR. GRUENBERGER: Thank you. Number one, Your Honor used a phrase a little earlier, opt-out. Our procedures do not provide for an opt-out. The mediation standing order does provide for, after mediation starts, a party may for cause

shown ask to be withdrawn. Yes, that is part of our approach.

THE COURT: What I meant by opt-out was that -- and I'm identifying the Reed Smith papers that were filed, I think this morning --

MR. GRUENBERGER: I think it was 7 o'clock last night.

THE COURT: I saw them this morning. And I believe you made reference to those papers, at least obliquely, in your opening remarks.

MR. GRUENBERGER: Yes, I did.

THE COURT: They argue that an indenture trustee lacks the power to participate in a meaningful way in a mediation, and that without guidance from real counterparties with economics, that they are, in effect, being forced into a wasteful process which they presumably will seek, even if these procedures are approved over their objection, to opt out of. I presume they will do that by filing a motion seeking -- I'm not proposing they do this, by the way, but I'm simply identifying something that might be done -- filing a motion or some other pleading that would say we can't participate in a meaningful way in these procedures, and we ask that we not be bound by the order, or we seek reconsideration of the order, or we seek exclusion from the ambit of the order.

I'm using that simply as one example. I am neither highlighting that for purposes of emphasizing the value or the strength of their argument, but simply to identify that it's

the most recent pleading I read on the subject, and so I'm identifying it as something that may be an example of not only what they have argued, but what others in a similar situation might argue, or that others might argue related to in personam jurisdiction. So all I'm saying is this. I think that there is the risk that in coming up with an order which is acknowledged to being imperfect by everyone involved, that we run the risk of creating problems that could be avoided if we spend some more time thinking about ways around those problems in advance.

MR. GRUENBERGER: Your Honor, I --

THE COURT: That's the simple reason that I'm suggesting some more time be spent.

MR. GRUENBERGER: Certainly. Just on that point, Your Honor. One of the three points I was going to make was, I think there has to be a decision by Your Honor today that enough is enough on filing papers. I mean, filing surreplies -- the BNY called it a reply, but this is our motion. We replied, they objected, we replied, they put in another paper. Now, if that's okay, everybody else is going to put in more paper between now and whenever that date is. And that just makes an impossible burden for us as well as Your Honor. So I think you should put a hiatus on filing more papers. I really do.

THE COURT: I'll discuss that point at the end of this

phase of the hearing. But at some point, it may be desirable, before the next hearing, that there be a status report concerning progress made in the negotiations and discussions. And so I would expect there would be some more papers, at least papers from the debtors and the creditors' committee, indicating what the next generation of the order looks like and what the remaining durable objections still look like.

MR. GRUENBERGER: Fair enough, Your Honor. I was only addressing more briefs in the nature of letters or briefs to the Court.

My next point, Your Honor, was going to deal with issues that have been raised by certain of the objectors, and that is that some of the objectors say well, you know, we -- you alluded to it partially a little earlier -- we negotiated a bar date order and a questionnaire after some hearings, and we, the counterparties, have to give information in order to support our claims against the debtors' estates. And that came after certain parties in that negotiation and hearing argued that well, what's fair for the goose is fair for the gander, and therefore the debtors ought to supply the same kind of information to the counterparties.

That objection was not granted. It was overruled, dropped. And now parties are trying to get in -- the counterparties, through the back door of this ADR process the same objection, that now we have to give to them what they gave

us in the bar date questionnaire. The purpose of those two different hearings and procedures are totally different.

We needed, as debtors, to figure out whether or not the proofs of claim had validity, because if there's no objection, as Your Honor clearly knows, there is presumptive validity. And so in order to object to that, we needed the information. This ADR process provides that we, in an ADR notice, give a brief explanation of our reasons for a demand for settlement. The only burden the counterparty has is to give the same quality of information to support either an acceptance or rejection of that demand, nothing more, nothing less.

But now, the delay -- and the delay is okay, it has a good purpose -- is going to bump us up near the October 22 bar date questionnaire date, which is October 22 or 23, I think. But that's okay. But I don't think that by this deferral, that we are going to have to -- I hope not -- automatically default to yes, we're going to give you the same kind of information now, because we never believed that was going to be possible, having Your Honor reject that the first time around.

So that's just the point I'm trying to make, is that the burden on us is going to be incredible if parties believe they can do that.

THE COURT: Well, Mr. Gruenberger, you've moved into a substantive point. And my suggestion, and it's just that, is

that time be spent to try to accommodate parties who have objections as to the form of the order or as to certain procedures that might be adopted to make this less burdensome on all parties.

MR. GRUENBERGER: Okay.

THE COURT: I certainly wasn't suggesting that the time be used to reopen issues that may be antithetical to the interests of the debtors, although that doesn't mean that people may not ask you for that again.

MR. GRUENBERGER: Right.

THE COURT: I'm simply talking about something that's very benign, or at least it seemed to me it was --

MR. GRUENBERGER: Agreed, Your Honor, and understood.

THE COURT: -- which is that maybe if we had a little bit more time, some of the fifty objections would fall away or would no longer be actively pressed, because we would end up with a more perfect order.

MR. GRUENBERGER: Your Honor, we will work the phones; we will work the negotiations; we will work the meetings, as best we can, as soon as we can. I promise you that.

THE COURT: Okay.

MR. GRUENBERGER: Thank you.

THE COURT: Fine. Is there anyone else who wishes to be heard at this point?

MR. WILLIAMS: Your Honor, if I may?

THE COURT: Okay.

MR. WILLIAMS: Good morning, Your Honor. Jeremy Williams, of Kutak Rock on behalf of the Nebraska Investment Finance Authority. Your Honor, just briefly. We do disagree, and I apologize for not rising sooner, to the implementation of the ADR procedures, because we believe that as a government entity, we would be exempted from the ADR procedures.

THE COURT: I don't know if that's true or not, but I'm not hearing that today. I read the response of the debtors to your objection, which references your Web site as a "quasi-governmental unit." I also understand that -- I'm not really ruling on your position now -- I also understand that you're there for purposes unrelated to the police and regulatory powers of the state, but that you provide what amounts to economic facilitation for business within the state.

Whether or not you're covered or not, I don't know, but I'm not going to decide that now. And if I were to decide it now, you would lose.

MR. WILLIAMS: Yes, Your Honor.

THE COURT: So, sometimes it's better just to stay back. Is there more for now? Anybody else like to come up? All kidding aside, anybody who does wish to be heard in connection with the ADR procedures should feel free to express a general position. But it seems to me that our time today might be better spent moving to other matters on the contested

agenda. But I do think that we should establish when next this will be heard.

MR. GRUENBERGER: Exactly, Your Honor.

THE COURT: My inclination is for this to be put over to the September 15 omnibus date, unless I can confirm a time on my calendar when it can be specially heard before that. And let's move on to other matters on the agenda. But I'm going to ask one of my law clerks to check with my courtroom deputy if I have any available time.

One of the problems that I have in September is I basically have no time. I have a very, very full calendar. So it's going to be a question of squeezing it. It may be that for purposes of at least putting a pin in the calendar that we should assume it's going to be the 15th.

MR. KRASNOW: Richard Krasnow, Your Honor, for the Chapter 11 debtors. I was going to suggest that I had thought most people in the courtroom really related to the matter that Your Honor just considered. Perhaps it would be less disruptive if there was a recess. But in light of Your Honor's statement, we can turn --

THE COURT: Well, why don't we do this. Why don't I go off the bench. Why don't I find out if there's a time that I can do this other than the 15th, because people who are here may want to know what that date is. And I'll come back. And when I come back, I'm going to give everybody time to clear,

and then we'll go to the next matter.

MR. KRASNOW: Yes, Your Honor.

(Recess from 10:59 a.m. to 11:02 a.m.)

THE COURT: Be seated. I never should have even thought about another date. The 15th is really the only date that works. My courtroom deputy suggested if I want to start sitting on a Saturday we could do it on a Saturday, but that's not going to work for anybody I don't think. So, the 15th on the omnibus day and anybody who now wishes to be excused is free to leave and then we can move onto the next set of matters.

MR. KRASNOW: Your Honor, should we wait a moment and --

THE COURT: Sure.

(Pause)

MR. KRASNOW: Your Honor, bear with us for a moment.

THE COURT: I've been bearing with you for almost a year.

(Pause)

MR. KRASNOW: Your Honor, I think we're ready. Richard Krasnow, Weil, Gotshal and Manges on behalf of the Chapter 11 debtors.

The next and final matter on today's calendar is the debtors' motion for an order enforcing the automatic stay and holding Shinsei Bank in contempt for violating that stay. Your

Honor, let us be clear that this motion relates to the facts in this case, not any facts that might be alleged in some hypothetical motion, facts not before this Court and which while alleged refer to in various pleadings filed in response to this motion, represent nothing but speculation and conjecture as to what the debtors' position might or might not be in connection with matters that have not yet come into existence in any court.

THE COURT: But Mr. Krasnow, one of the problems with taking that position is that to the extent that there is a determination made with respect to the application of the automatic stay cross-border in Tokyo and the administration of a Tokyo insolvency case, the principles would appear to be comparable to the principles who would apply in any other insolvency proceeding affecting Lehman anywhere else on the globe. And so it becomes difficult, I'm just making this point so that I see this as a situation contrary to your present articulation which establishes a principle that probably does have broad application. And for that reason, I welcome and will hear all of the objectors who have raised questions that you've demonized as hypothetical.

MR. KRASNOW: Your Honor, I wouldn't say we demonized it.

THE COURT: Well, maybe I overspoke, but I think it's pretty close.

MR. KRASNOW: But, Your Honor, the issues and the facts specific to this case could well exist and indeed there is a proceeding in California, as Your Honor is aware, where there is a similar situation. And so the questions of comity, full faith and credit, what may occur in a bankruptcy proceeding involving a non-Lehman debtor in Delaware, California or a proceeding that is pending in Japan or anywhere else is, in our view, not at issue. The question is, in our view, is whether or not conduct of this creditor, the conduct in another court whether that court is in Japan or in another state, is conduct which violates the automatic stay. The target here is not, as suggested by Shinsei and some of the other objectors, the jurisdiction authority of courts outside of this court to exercise their jurisdiction. We're not here today suggesting to the Court that the Japanese court, that the court supervisor doesn't have the jurisdiction to determine the issues that have been presented to it. We're not asking this Court to divest those other courts, to divest the court supervisor of the jurisdiction that it has. Rather, the focus here is whether or not by invoking the court's jurisdiction the creditor has violated the automatic stay. This is no different in that respect than if Shinsei Bank or a creditor had commenced an action in some court seeking a recovery from the Chapter 11 debtors.

The court in which they commenced the action may well

have the jurisdiction to consider the issue, the subject matter jurisdiction, it may have in personam jurisdiction over all the parties, but that doesn't mean that what that creditor has done and what we allege Shinsei has done is permitted under the automatic stay. So to that extent, Your Honor, that is the reason why we say comity is really not at issue. The protocols that this court has approved and is endorsed as we have is not at issue. There is nothing in the protocols that is intended to modify the rights that the debtors otherwise have to the protections afforded to them under the automatic stay. And so that's really the reason why, Your Honor, we've said that these hypotheticals, which have been conjured up, really have no bearing here because this motion is specific; it relates to the specific facts of this case, it relates to precisely what Shinsei has done and the question is whether or not that conduct, that conduct, is violative of the automatic stay.

THE COURT: Now, my understanding as to what Shinsei has done is that consistent with procedures applicable to insolvency proceedings in Japan, they have permissibly filed an alternative plan in the Tokyo district court which, if approved, would result in an outcome detrimental to the interests of Lehman. Whereas, if the Lehman plan were approved there would be an outcome detrimental to the interest of Shinsei in relative terms. Do I have it right or wrong?

MR. KRASNOW: If I can characterize it somewhat

differently, Your Honor?

THE COURT: Sure. But I'm trying to understand the basics.

MR. KRASNOW: Your Honor, can I answer the question by going through what we believe and to a large extent has not been contested by Shinsei as the facts, the relevant facts as they pertain to the --

THE COURT: I don't want to interfere with your argument at all. I'm really focused on the comity issue which you said is not part of this dispute, because it seems to me that it is and I need to understand why you assert that it's not. Because if what you are saying is that a Japanese creditor in Japan cannot permissibly assert a position in a local court that would otherwise be assertable in that court without first coming to this court to obtain relief from the automatic stay where that action would be potentially detrimental to the property interests of Lehman, I think that does raise a comity issue. And we can discuss that at some point in the argument. I want you to know, and that's why I've interjected, that I don't accept your original proposition that this is just like it's happening in a state court or before Judge Smith in the Central District of California in SunCal. I view it as different.

MR. KRASNOW: Your Honor, even if it addresses a comity issue, comity, as far as I am aware, is not a defense to

a action taken by a creditor that otherwise violates the automatic stay. And the focus here -- comity, as I understand it, really relates to the relationship between the courts and it's an international variation, if you will, of full faith and credit. And as I noted earlier, this is not a full faith and credit issue. It's not a question of whether or not another court in the United States or a court in Japan has jurisdiction and whether or not that jurisdiction should be recognized by this court or whether the Japanese court should recognize the jurisdiction of this court. It is rather focused on the actions of the debtor.

To answer your question as to what Shinsei has done, broadly speaking that's correct but the manner in which they are effectuating what Your Honor has described, is what is at issue here. It's not simply proposing another plan where Lehman's recoveries would be different than what is proposed, not under the Lehman plan but the Sunrise Finance plan. It is that they are taking a position with respect to that which would result in a reduced recovery, which in our view violates the stay. It is not defensive in nature. It is offensive in nature. And that, to us, is a critical difference and it is a critical difference that has been recognized in this court.

If I may, Your Honor, just briefly touch upon some of the facts as they relate to what is happening in Japan or has happened, because it's relevant to exactly the point that I've

just raised.

Sunrise Finance, which is an affiliate of Lehman, is the subject of a proceeding in Japan; a rehabilitation proceeding and thus Sunrise itself is a debtor-in-possession, if you will, under Japanese law. In connection with that proceeding there was a requirement that claims be filed. Shinsei Bank filed a claim, LBHI, the Chapter 11 debtor, filed a claim, as did Lehman Brothers Asia Holding which we refer to in our papers as LB Asia. LB Asia itself is the subject of insolvency proceeding in Hong Kong. LBHI is the single largest creditor of LB Asia and thus would reap the benefits of substantially all of the recoveries that the joint provisional liquidators of LB Asia successfully obtain.

The claims that LBHI and LB Asia filed in connection with the Sunrise proceeding represent approximately seventy-two percent, it's our understanding, of the total claims asserted against LB Asia. Consistent with the Japanese law, there was a date by which objections, if any, had to be filed to claims. It is our understanding that objections in that proceeding could be filed not only by Sunrise, the debtor, but as well by creditors. No objections were filed by anybody by the deadline established in that case to the LB Asia's claim.

Sunrise did, in fact, challenge the amount asserted by LBHI in its claim. The challenge went to the difference between what our books and records reflected what was due and

what Sunrise's records reflected what was due. That dispute was resolved when LBHI reduced the amount of its claim to the amount reflected in Sunrise's books and records.

LB -- Sunrise, thereafter, approved, did not challenge, the claim filed by LBHI as amended. Nobody else, including Shinsei Bank, challenged or disputed the claim filed by LBHI in its original amount or as amended.

It is our understanding, and is reflected in a supplemental declaration by a Japanese counsel supports this, that under Japanese law as a result of their not having been any objections interposed to either LB Asia's claim or LBHI's claim as amended, they are allowed valid claims. That, in our view, is a pivotal point, Your Honor. Thereafter, Sunrise filed a plan which contemplates a distribution, pro rata distribution, of around twenty percent of allowed claims to creditors similarly situated. And in that regard, it's our understanding, LBH's claim, LBHI's claim and Shinsei Bank's claim are all similarly situated and thus we would all get a recovery of twenty percent.

Shinsei filed a competing plan. And it wasn't simply a competing plan which suggested different classes of creditors and the like, it was a plan where the material difference between the Sunrise plan and its plan went and goes to an attempt through the plan to equitably subordinate the Lehman claims.

We accept and agree with the characterization in Shinsei Bank's objection to what that means under Japanese law. That is a reprioritization of claims. Claims, we submit, that would otherwise be allowed. It is a means by which distributions which would otherwise be made to Lehman in respect of its allowed valid claims would be reallocated to other creditors with the primary beneficiary being Shinsei Bank. That is what is before the Japanese court. That is what Shinsei Bank did. The issue, therefore, is fundamentally whether or not that kind of action, whether it occurs in a Japanese court, a court in the States, a court in another foreign jurisdiction, is of the type that violates the automatic stay.

Now, there are references throughout the pleadings that have been filed in the objections of those filed by Shinsei and by some of the other parties who are strangers to this proceeding and whose objections, we submit, should simply be overruled for the reasons set forth in our reply, that the law is clear that once a Chapter 11 debtor participates in another proceeding, call it a foreign proceeding, foreign to the home court, if you will, this court, if you will, with respect to Lehman, whether it is in Japan or elsewhere, that the automatic stay cannot be utilized to prevent another party from acting in a defensive matter in respect of a claim that's been filed by the debtor. We agree, Your Honor. We cannot

file a claim in another Chapter 11 case or another rehabilitation proceeding or a liquidation proceeding overseas and simply contend that the other side, be it an administrator, a liquidator or creditors in that case, if they have the right in those -- under those governing laws of the foreign proceeding to object to a plan, that we cannot stand up and say our claim is valid, per se, you cannot challenge it, because to do so would undercut our ability to get a distribution and violate the automatic stay. That is not our position. That shouldn't be our position. It can't be our position. We accept the fact the defensive actions taken in respect of actions taken by a Chapter 11 debtor are absolutely permitted. It is our view, however, that the attempt to equitably subordinate a claim is not defensive in nature. It is offensive in nature.

And we point out, Your Honor, and the objectants point out, one or more of them, that, in fact, that issue, which is, again, I think goes to the core of our motion, is equitable subordination defensive or offensive has really only been addressed, as best as we can all determine based on our pleadings, by three courts. And I used the address in the sense of, at least as to two of the decisions that are referred to by the parties, as at least mentioning subordination not really analyzing the issues. Those three decisions are the SunCal, as I will refer to as SunCal decision that I'm sure

Your Honor is aware of, which is, Your Honor, in another matter, a Chapter 15 matter, is noted as the law of that case and not this case, the court did there note its view that equitable subordination was defensive. It was a conclusory statement without any analysis. It is on appeal. But there is absolutely no analysis of a fundamental difference between an objection to claim and equitable subordination.

The other decision that I've alluded to that the other parties rely upon is the decision in this court by Judge Drain in the Miteom case.

In that particular case, the Chapter 11 debtor before Judge Drain had filed a claim. A trustee in another case objected to the claim and in its objection it also asserted as alternative relief equitable subordination. The judge, in that case, in our view, really didn't analyze a fundamental difference between equitable subordination and objection. Focused more on the objection to the claim, the challenge to the validity of the claim, and in that context concluded that the objection was permissible.

And as to equitable subordination, focused on the fact that the trustee who had interposed these challenges contended that it was not seeking affirmative relief and on those grounds Judge Drain said, well, this is defensive in nature. We would submit that we believe Judge Drain is wrong and that the appropriate analysis to be undertaken is that which Judge

Gonzalez did in Enron, which we believe is on all fours with this particular case.

In that case, Enron had asserted a claim in an Indiana proceeding. An adversary proceeding was commenced seeking to equitably subordinate that claim. There was no objection to the claim. So it was the pristine issue which, if you will, which is before this court, a claim that was not being challenged as to validity or amount but rather was being subject to equitable subordination. And Judge Gonzalez noted that the very nature of equitable subordination is -- first it is premised on an acceptance of the fact that the claim itself is valid and allowed. And that what the party, the offensive party, is seeking to do is exactly what is being sought in Japan as acknowledged by Shinsei Bank which is to take an allowed and valid claim, subordinate it to and reprioritize it vis-a-vis other claims so the distributions that the claimant would otherwise be entitled to are redistributed to others. That, Judge Gonzalez noted, is offensive in nature, it is not defensive in nature, and therefore is subject to the automatic stay.

We believe, Your Honor, that the analysis undertaken by Judge Gonzalez as set forth in Enron is the correct and more persuasive analysis. It applies directly to this case. And that Your Honor should, we suggest, should conclude that as in Enron so to here the actions that Shinsei Bank has taken

through it's plan, and this is the primary focus of the plan if not the singular purpose of the plan, to equitably subordinate our allowed claim violates the automatic stay, that they are in contempt for having taken that action and that, therefore, they should purge themselves of that contempt by withdrawing their plan.

Your Honor, unless the Court has any questions, for the reasons I've stated and as reflected in our motion, we believe that the relief we sought should be granted.

THE COURT: I have a couple of questions.

Your argument assumes that what is happening in Japan is equitable subordination. I don't know if that's true or not. Did the parties stipulate that that's what's happening or is there any dispute with respect to the relief that's being sought in Japan as a result of the Shinsei plan? The reason I bring this up is that as far as I know, the term "equitable subordination" if used in a Japanese court probably wouldn't resonate.

MR. KRASNOW: Your Honor, that's why I, in my argument, refer to Shinsei Bank's description of what they're seeking to do which is consistent with what -- how we've articulated it.

THE COURT: Well, I understand that their plan would elevate their claim and the claims of others in the same class and would subordinate or put in a more junior class claims in

which LB Asia and LBHI currently would be pari passu under your plan, they'd be junior under their plan, correct?

MR. KRASNOW: Yes, Your Honor.

THE COURT: I don't know whether or not classification for purposes of an alternative plan under the Japanese insolvency regime is or is not the equivalent of equitable subordination.

MR. KRASNOW: Your Honor, again, I would refer the Court to Shinsei's reply where I don't believe they challenge our characterization, and indeed describe in a defensive manner that we don't believe it's meritorious, but in a defensive manner that what they are seeking to achieve through the plan is to reprioritize the claim, which is the terms actually used by the courts and in the decisions that I've described, including Judge Gonzalez's, as how we view equitable subordination. And if one peruses the plan and opinions that were filed by Shinsei Bank, the reasons why they believe that the Lehman claim should be subordinated, and we're talking about translations from Japanese to English, while the merits of what they say certainly don't resonate with us, the arguments that are being made resonate to me, anyway, in terms of what I would often see when one comes across a claim that someone is saying should be equitably subordinated.

So, Your Honor, I would submit that based upon the pleadings that were filed in Japan, and again, Your Honor,

there's a translation issue, but what one doesn't have to translate is, in fact, the objection that Shinsei Bank filed and I think it's clear there that what they're talking about is equitable subordination, in essence, as we know that.

THE COURT: I don't meant to elevate form over substance, but one of the things I'm struggling with is that in the ordinary course of U.S. Bankruptcy practice, a claim might be equitably subordinated by means of an adversary proceeding, or it might be subordinated by means of classification and then there would be litigation concerning the reasonableness of that classification. But there would be litigation, no doubt, unless parties consented to the propriety of that classification scheme.

In the context of a Japanese insolvency proceeding, it is unclear to me whether or not as a matter of applicable jurisprudence the District Court judge sitting and comparing these two plans is involved in a litigation context in which a party is taking shots at LBHI, or whether or not the court is evaluating the reasonableness and fairness of two schemes and making a decision yes, this one is fair, I will support this one. I don't know how it works, and I don't know if there's a distinction to be made. But it seems to me that if what a foreign judge is doing consistent with applicable foreign law is assessing the reasonableness of a distribution scheme, the consequence of which may be adverse to a party in bankruptcy;

in this case LBHI, that's a perfectly reasonable thing for the judge to do, and I don't think the automatic stay is implicated.

MR. KRASNOW: Your Honor, I'm not going to necessarily disagree with that, however, I certainly am not going to stand up in front of the Court as someone who is facile and an expert in Japanese law.

THE COURT: I suspect there's no one here about to stand up and say that.

MR. KRASNOW: Having said that, Your Honor, I think one can be informed as to the issue that Your Honor has raised. By looking at the pleadings -- what I'll characterize as pleadings, what are, I think, referred to as opinions, filed with the Court's supervisor -- by Shinsei Bank, yes, by Lehman, we did participate in that proceeding, we're not denying that. And what, at least, I gleaned from those pleadings, those opinions, and what each of the parties have put before the Court's supervisor is not questions of classification, but specifically whether or not equitable subordination is or is not appropriate.

So, again, Your Honor, what I glean from those -- from the position taken by Shinsei Bank and how they have articulated them before the Japanese court it's apparent to us, in any event, that what is at issue is precisely what would be at issue here were there to be a proceeding commenced against a

party contending that their claims should be equitably subordinated. Not does this party belong in that class or another class.

THE COURT: Can you tell me how the treatment of the LBHI claim under the Shinsei proposed plan in Tokyo violates the automatic stay?

MR. KRASNOW: It is our position that it is -- if you will form over substance to look at the manner in which Shinsei is seeking to equitably subordinate; whether it is by an adversary proceeding or how they have done it in the plan, that that attempt to subordinate what is otherwise now a valid and allowed claim, is for the reasons set forth in his analysis in the Enron decision, in Judge Gonzalez' rationale, is an offensive act, not a defensive act. And where a defensive act would not violate the automatic stay, an offensive act, which in this case is seeking to reallocate distributions we would otherwise receive on our allowed claims, is taking control over property of the estate, and is precisely what goes to the core of the automatic stay and is a prescribed act.

THE COURT: Is it taking control over property of the estate to obtain an order from a court of competent jurisdiction regarding an appropriate distribution scheme under applicable foreign law?

MR. KRASNOW: I will go back to what I said earlier in my argument. It is in our view in the context of the specific

facts here. I am not prepared to stand up before Your Honor and argue that every time there may be a plan proposed before any Court, which affords one treatment for Lehman and presumably other similarly situated creditor, and another, that that is a per se violation of the automatic stay. If that's what Your Honor is asking I can't say that it would be. There might be facts and circumstances specific to a particular plan, such as we submit has occurred in connection with the Sunrise proceeding, where there would be a violation of the automatic stay. But we're not -- I mean, the parade of horribles that has been described, alluded to in certain of the objections, that somehow for example, we're taking the position that if somebody -- another creditor to a foreign debtor, for example, files a claim in connection with that case because that would dilute our distributions, that somehow that violates the automatic stay, for us to assert that would be absurd, we're not taking that position.

I'm reluctant to say there's a general rule, Your Honor, because as we all know what the Court will render a decision based on specific facts, and, again, we're saying the facts here are such that what Shinsei Bank is doing is violative of the stay.

THE COURT: Okay. I think I should hear from Shinsei Bank's counsel.

MR. KRASNOW: Thank you, Your Honor.

THE COURT: Mr. Trost, good morning.

MR. TROST: Good morning, Your Honor.

Apparently, the motions are quite different that the debtor filed. We apparently responded to a different motion than the original motion, which complained of Shinsei conduct.

But before we get to that, let's correct the record on one set of facts. The creditors in the Sunrise proceeding, which is an administration proceeding, the by far -- the biggest by far Lehman family creditor is LB Asia for 99.5 percent of the claims. Translating roughly, don't hold me to these numbers from yen to dollars, LB Asia, which is in a Hong Kong liquidation proceeding, with administrators, filed a claim in the Sunrise case for roughly 2.4 billion dollars. LBHI, which is the proponent of this motion, has filed a claim which is now fifteen million dollars.

LB Asia is not a debtor in these proceedings. So what the motion seeks in the second motion, because we misunderstood apparently -- we and everybody else misunderstood the first motion which had nothing about offensive and defensive. Just says Shinsei was on the creditors' committee, and we abused our position, and the automatic stay applies. By the way, the debtor later retracted any suggestion in their supplemental pleading, any suggestion of any kind of misconduct by Shinsei.

THE COURT: So there's no need to discuss it.

MR. TROST: Nothing to discuss on that. But the

creditors, the Lehman family creditors, look at the impact your ruling would have if you ruled that we were in contempt of court because we did not know that the automatic stay prevented us from asking the Sunrise administrator to consider a plan which treats the creditors' classification differently than the Sunrise plan. And LBHI only has fifteen million dollars at stake. Even if LBHI had everything, we would come out to the same place the automatic stay could not possibly prevent the Japanese proceeding from going forward.

And isn't it interesting that the debtor concedes had we or some other creditor objected to the LB Asia claim in that one week we had to do it, in the fall of 2008, between November 25th and December 2nd, is what they say. We could have done it then, we could have said you have no claim at all, LB Asia. We could have said you had no claim at all, LBHI. They admit the automatic stay wouldn't affect that. But we are prevented -- because of that we are prevented from suggesting as you raised the question that there are two plans that the administrator should consider. One, that classifies the Lehman claim of fifteen million dollars, and classifies the LB Asia claim of 2.4 billion dollars on a par with the third-party creditors, that's one plan the Japanese administrator could deal with.

There's another plan the Japanese administrator could deal with. And that plan treats the creditors differently, like it would be common under our practice for people to

suggest that a class of creditors should not be treated equally. And the facts in the case, I'm going to refer the Court to some exhibits we filed as part of our declaration. The facts in the case make it quite clear, that Sunrise was "Capitalized by debt." It had almost no equity.

But LB Asia is not a debtor in these proceedings. How could it be that the automatic stay in the United States Bankruptcy Court could stop in its tracks the ability of creditors to contest what the classification should be. We didn't have time to file a declaration because we received the reply sometime yesterday. I think it was filed -- they didn't hold back, just that things happened over the weekend. But we did ask our Japanese lawyers whether in spite of the fact that the claims were allowed, whether a rehabilitation plan under Japanese procedure could still reclassify the claims different than they were allowed? And the answer is yes. I represent to you and we would file such an affidavit, but I don't think it makes any different. LB Asia is not before this Court.

Let me go to a second series of facts. Your Honor has all this in our exhibits. When Lehman filed their hypothetical motion, the first motion they filed was a hypothetical motion, which said all of these things. They referred -- they attached in the declaration, I believe I have this correctly, three pleadings that had been filed before the Japanese -- in the Japanese court to be considered by the Japanese supervisor.

One on May 15th was a rehabilitation proceeding filed by Shinsei. And it classified the claims different than had been filed by Sunrise; the affiliate which is owned in the chain of Lehman.

They also in the Japanese proceeding on May 22nd, there was filed by Asia, may I just call Lehman Asia Holdings Asia and LBHI, the debtor in this case, an objection to the Shinsei plan. Those were filed in the movant's papers.

There was also filed by Shinsei an application to amend the Shinsei plan. And then two very important documents were omitted from the original motion. And these -- the lawyers for the debtors all involved in this, Shinsei gave to the -- these two are in our papers, not mentioned in the papers, Shinsei filed an opinion brief, a brief, in support of its classification of claims, which it had a right to do under Japanese law. What did LB Asia and the debtor do? They didn't come to this Court and say automatic stay violation, automatic stay violated. This motion was filed on August 11th. They didn't come to this Court when other papers were filed. At no time when these papers were filed raising these issues under Japanese law in a Japanese proceeding, before a Japanese supervisor who is going to decide which of these plans to send to creditors, they didn't come to this Court. They could have come in -- they could have come on May 16th; the day after May 15th. They could have come on May 22nd. They could have come

on June 27th; the day after Shinsei filed an application to modify its plan. They could have come on June 27th when Shinsei said this is why we think our classification is proper. They didn't come to this Court. And, moreover, on July 17th in the English translation of sixty-seven pages, LB Asia and this debtor jointly filed an opinion brief as to why its improper not to classify these claims. That's what they did. Something happened after July 17th that caused the debtor to consider the fact hey, we better stop this. We better stop this proceeding before the Japanese court. And, although, Mr. Krasnow, who's a fine lawyer articulates -- tries to narrow the scope of what he's seeking to do, if he were really seeking to punish this offensive defensive kind of dichotomy that's how cases are going to be decided, about whether you can proceed in a Japanese proceeding. Why didn't they seek an injunction, why didn't they file a complaint for an injunction? You would have tossed it out.

So they've made all these arguments that they want to make in the proper place in Japan. And if you were to do anything -- and by the way, all of these papers are in our declaration -- Mr. Kleiner's declaration, and they're not all in Mr. Labine's declaration because they didn't tell you about two of these things. They didn't tell you about their sixty-seven page brief. Why didn't they tell you about that in their opening papers?

THE COURT: Mr. Trost, let me ask you a question. Do you know what the procedure is at this point in reference to these two competing plans? And do you know, what, if any, action is taken either by Shinsei or by Lehman entities in the prosecution of one plan or the other? What happens next?

MR. TROST: Okay.

THE COURT: If you know. If you don't know that's a perfectly good answer.

MR. TROST: I do know. I can tell you what I think I know.

THE COURT: If that's the best you can do.

MR. TROST: But our Japanese clients are with us today, they came in from Tokyo. This is a very, very, very serious matter for Shinsei Bank.

MR. TROST: What happens -- isn't it telling that we're spending all our time talking about what's happening in Japan and what is the procedure in Japan and Mr. Krasnow do you know and Mr. Trost do you know, and Your Honor is right. So what happened in answer to your question. These two competing plans are before our supervisor who is something like a mediator. I mean, I think he is a person who wants the two sides to come together. So one plan, and only one plan can go out to creditors.

THE COURT: The supervisor is not a judicial officer?

MR. TROST: I think he's a judicial officer, but I

don't know that. But this is within the Japanese court system. The Japanese civil court system, this is a bankruptcy proceeding in the Japanese court system. And the supervisor has these two competing plans, and he's going to recommend one to the Court to be distributed to creditors to vote. That's all I know. That's basically what I know. But he is very, very important. The supervisor serves as the traffic cop in terms of their plan process.

And as a matter of fact, the -- Shinsei in a pleading that we are instructed by the supervisor we cannot incorporate into the record, there was an effort to mediate this dispute which the debtor turned down. Before the debtor turned it down probably two weeks before they filed this motion. So the answer to your question, I think I've answered it.

THE COURT: You have because you've qualified it by indicating it's just what you know. But I want to ask you if there's something else that you know. Which is whether parties-in-interest, like Shinsei, or Lehman, have the ability to engage the supervisor to take action in front of the supervisor to influence the supervisor in terms of his exercise of discretion, in terms of what's planned to adopt. That's question one. And question two is, is there a procedure for sending out the plans to creditors?

MR. TROST: I don't know the answer to the second question. I do know the supervisor wants send one plan to the

Court and then go to creditors. And my understanding is they communicate, the parties -- the Japanese lawyers communicate with the supervisor. I'm not sure what the process is. My guess is it's not formal.

THE COURT: All right, go ahead, I interrupted you.

MR. TROST: By the way, the LB Asia facts are all in our brief, and I'm not going to -- as Mr. Krasnow did not, I'm not going to go over all of that. All of the arguments are in our brief, and I'll just try and hit the points which I think are appropriate for oral argument. Because having sat through the Court this morning, I know how busy you are.

When we received the reply brief which shifted the focus of the motion, we learned for the first time that because we did not -- because the claims were allowed to be treated as allowed claims, that we are barred -- all creditors of Shinsei -- of Sunrise are barred from taking any position of any form which would treat the LB Asia claim. Let's just focus on that one at less than parody with everyone else. We learned that for the first time. We learned that we could have done it had we filed an objection to the claim. The case was filed in September, enormous case, you know what the Lehman case is, the same thing over there. Nobody had any information. Alvarez & Marsal was trying their best to gather the facts, and you know what it's been like. So that's what we learned for the first time. I almost have to pinch myself to say how do I address

this subject with a straight face. But I'm going to try and address that subject with a straight face.

I've covered a number of these points.

THE COURT: Mr. Trost, let me break in and ask you this. Do you accept the offensive versus defensive distinction that has been articulated by counsel for Lehman in this instance? In other words, assuming you had been on your toes in that week that you describe as a remarkably brief period of time to do something that's permissible, mainly object to a claim. Assuming you would have objected to the claim, which would have been offensive, that's permissible. But the taking action to subordinate is impermissible because it's taking action to exercise control over property of the estate. Do you accept the jurisprudence that provides for that dichotomy of behavior? In other words, defensive behavior is in the safe zone, but offensive behavior violates the stay?

MR. TROST: I do not accept it, but you -- I submit that you mischaracterized what Mr. Krasnow's position is. He conceded to you that we are not seeking to enforce -- to control property of the estate.

THE COURT: I think it's exactly what he said. That's exactly what he said.

MR. TROST: That's not --

THE COURT: I heard him say when I asked him a question tell me how what Shinsei is doing in Japan violates

the automatic stay and he said, unless I heard him wrong, they're seeking to exercise control over property of the estate by seeking to subordinate the claim, that's what I heard. Is that what you said?

MR, KRASNOW: Yes, Your Honor.

THE COURT: Okay.

MR. TROST: I do not accept it. You asked me if I accept that, absolutely not. We are not seeking -- first of all, how do you deal with LB Asia? LB Asia is not a debtor in this proceeding. How could they -- and they represent 99.5 percent of the Lehman claim. They're not a debtor here, they're not a party to this proceeding. They haven't sought an injunction.

With respect to this issue that came up of offensive and defensive, I'd rather go with Judge Posner in his two cases, Martin Dragona (ph.) and the other case that we cite in our footnote. We have a right to defend ourselves over there in this Japanese proceeding. Assuming this even should be an interest to an American court, it would be -- others are going to address this. It would be a horrible precedent and barred American bankruptcy law to have a rule that if a creditor files a -- a debtor here files a 10,000 dollar claim in the UK administration or the Japanese administration that you're done, you can't go forward. And as of today they're saying they just want to prevent our offensive conduct. Well, how does anybody

know what they can do in the Japanese proceeding? Shouldn't this be for the Japanese supervisor and the Japanese court to decide?

If you were to enter this order that we violated the automatic stay and it's been conceded that we can do defensive things but not offensive things, what do we do over there? If the supervisor calls us and says he wants to talk to us and LB Asia about what to do we got to go to Judge Peck in New York to find out if we can go to the meeting. It just can't be. This can't be -- others are going to address this comity issue. And the fact that a fifteen million dollar claim by a debtor in a case with two and a half billion claims triggers all this, frankly, boggles my mind.

Now, with respect to the Enron case I do not believe -- that was a case, by the way, where there was a motion -- they're proceeding in that case was a complaint, an adversary proceeding to subordinate, I don't think it makes much difference. But I do not subscribe to that difference. And I do not think it should be the law of the case in this situation either.

So leaving time for others and knowing that you're busy, I would just like to leave with this thought. I think Lehman's position, LBHI's position is untenable. I could say, but I'm not going to it's disingenuous because it came up at the very last after all these papers were filed in the Japanese

court. And because we didn't object because Shinsei or the other creditors did not object to the proofs of claim in the one-week period does not mean even if you were to consider somehow you want to get involve in all this mess over Japan, does not mean we can't at the supervisor's request file a competing plan of rehabilitation.

THE COURT: Did you say at the supervisor's request? Did they supervisor request that this plan be filed, or did you voluntarily file it?

MR. TROST: I don't know the answer. But I do know that he now wants the two parties to get together on one plan. So that I do know.

The supervisor -- my understanding is -- I'm not a Japanese lawyer I didn't --

THE COURT: That's obvious.

MR. TROST: And I don't think any of us at this table, on either side, knows the ins and outs of the Japanese corporate reorganization law.

THE COURT: The reason I'm asking questions about it and the reason I've asked you questions about it and I've asked Mr. Krasnow questions about it is I'm trying to understand what precisely is going on in a Japanese proceeding so that I can, in my own mind, characterize it within U.S. jurisprudence as to whether or not it does or it does not constitute a stay violation. The mere fact that something is happening cross

border does not mean that it isn't a stay violation.

MR. TROST: Correct.

THE COURT: If Shinsei were to go into a Japanese district court and seek to pursue claims against LBHI that would be wrong.

MR. TROST: That's a different case.

THE COURT: Obviously. What I'm saying very simplistically is the fact that there are proceedings occurring in a foreign court that's simply an irrelevancy in terms of analyzing whether the stay applies. It does apply to foreign proceedings where 362(a) can be determined to be implicated. What I'm trying to do determine as a matter of law is whether what Shinsei has done in a set of proceedings that I am unfamiliar with and so are you actually violates the stay. It could violate the stay. The fact that it may create a parade of horribles would be unfortunate. But one of the consequences would be that if there is a stay violation someone would have to come here and get stay relief. Parties in the past have tried to do that, Shinsei did not. I'm not suggesting by these comments that what Shinsei has done violates the stay, but it could be that if, for example, what was done in the Tokyo court was not the filing of a competing plan, but the commencement of a complaint against LBHI, a creditor, in the Tokyo District Court seeking to subordinate the claim that that would much more clearly fit within Judge Gonzalez' Enron decision.

What I am struggling with and what you should understand is that just because there are adverse consequences to the strict application of U.S. law doesn't mean that U.S. law should not be strictly applied. The question is whether or not it should be applied in this instance. And in order to apply it in this instance I need to understand the facts and I really don't have them.

MR. TROST: I have two answers -- to points. The first point is you have these papers, these are in the record. I can give you a separate book. These are all the facts that we have. And you will see what's going on as far as I know. These are three pleadings from the debtors' motion and three pleadings from our motions, all are in the declarations.

What is going on is that there have been competing plans of reorganization, these are liquidation plans. Competing plans of reorganization with different classification of claims. And they're before the supervisor and the parties have been filing briefs with the court which the supervisor reads advocating one set, which is the Shinsei set which treats the claims as subordinated. And one plan which treats them all as pari passu. That's as much as I know what's going on.

Plus, the supervisor would like to get the parties together so that they could agree on one plan. And that has been rejected by the debtor.

The second point, Mr. Krasnow -- I don't think I

misunderstood this in the brief. He concedes that we had the right to object to LB Asia and LBHI between November 25th and December 2nd without coming to this Court to seek permission. He concedes that in his written papers, he conceded it in oral argument. So they have conceded that but for the fact that we didn't do anything by December 2nd, this is converted into this dichotomy of offensive and defensive, and all of a sudden we violated the automatic stay.

THE COURT: I don't think he's conceding anything. I --

MR. TROST: Oh, he does concede that, Your Honor.

THE COURT: No. I think what he was saying is that for purposes of existing jurisprudence doesn't involve anything dramatic, it's perfectly permissible for a party in a second debtors' bankruptcy case to object to a claim filed by the debtor from a first bankruptcy case. That a proof of claim in which the debtor submits to the jurisdiction of another court can be objected to principally without stay relief.

So what he is saying, however, if I'm understanding his argument, is that that's different from filing an adversary proceeding seeking to subordinate an allowed claim.

MR. TROST: We haven't filed an adversary proceeding, that I can tell you.

THE COURT: I understand that. And one of the reasons that I am asking as many questions as I have asked regarding

what is going on in the Tokyo District Court is to try to determine procedurally whether or not it is or is not comparable in any way to adversary proceeding practice, or taking offensive action, or doing anything procedurally that would be deemed the exercise of control over property of the estate. Because if it's any of those things the stay is violated. If it's not, if it's characterized as this is just ordinary course Japanese practice in which competing plans are submitted, it happens all the time, and the supervisor looks left and looks right, weighs them and compares them, says I like this plan better and throws it out for a vote, I'm not sure that violates anything.

MR. TROST: That's where they are, the latter. And I would raise this point --

THE COURT: I appreciate the fact that you've said but you've also said you're not a Japanese lawyer and I accept that fact, and I'm not sure I can accept that representation. So what I don't know from the stack of papers that I have, I believe this is that binder, what I don't know from that stack of papers, despite all of the translations from Japanese into English is procedurally exactly what happens next. And procedurally what has happened in Japan. Is there a court like this, with people sitting around and a record maintained, is there due process of the sort that we ordinarily expect in a U.S. Bankruptcy Court. I recognize that the procedures are

different, I recognize that Japanese legal proceedings are entitled to respect in this country, the due process as we know it is accorded, but it differs from situation to situation. I don't know enough about it to know whether or not rights of creditors are fully respected and protected. I just don't know. And I suspect there isn't a person in this courtroom who really does. But if there is I'd like to hear from him or her if there's a position to express in this point. And if we don't have a position to express on this point I expect supplemental briefing.

MR. TROST: I would make one point and I'll sit down. LB Asia. Does it under any stretch of the imagination how could the automatic stay prevent any creditor from opposing LB Asia, which is not a debtor in this proceeding. The allegation in the debtors' motion is they have the beneficial interest in the recovery. But LB Asia is in a liquidation proceeding with joint administrators in Hong Kong.

THE COURT: I'm not dealing with LB Asia for purposes of what I just articulated. To the extent that there's a stay violation as to LBHI that's really all that matters for purpose of today or, frankly, the next day that we have a hearing after supplemental briefing.

I view the LB Asia issue to some extent a red herring comparable to Lehman ALI in the case of SunCal which was referred to by debtors' counsel. Lehman has a lot of entities

and most of them are not in bankruptcy. Those that are in bankruptcy are entitled to stay protection, those that are not in bankruptcy are not entitled, but there may be derivative benefits.

MR. TROST: Thank you.

THE COURT: Is there anyone else who wishes to speak at this point on this subject? Mr. Flics.

MR. FLICS: Your Honor, Martin Flics of Linklaters LLP on behalf of the joint administrators of the Lehman European Group administration companies.

I will be very brief and thank you for hearing me today. I assure you that I have absolutely no insight to offer on Japanese bankruptcy law. And it may be that the decision in this matter does turn on some specific matters relating to Japanese bankruptcy law. And so I will just make a few general comments for whatever they are worth.

First, Your Honor, the original motion when we read it did cause us some degree of concern based on the arguments that it made and based upon a bit of a floodgates argument that was actually mentioned, I believe in paragraph 35 of the motion, that if we allow this other creditors will -- may do similar things, whatever similar might mean. And we did attempt to contact the debtors' counsel to get some comfort on that, we weren't successful to do that and that was the reason we felt that it was appropriate to file the pleading that we did.

Your Honor, speaking at a very general level. Obviously, we all know there a many foreign insolvency proceedings. I suspect that just at this is the biggest bankruptcy case ever, I believe there are probably more foreign solvency proceedings with respect to this entity than there ever has been. And it is the nature of insolvency proceedings, I believe, it is fair to say, that there is an ordinary process. There are many differences, of course, among insolvency regimes, but there's a fairly ordinary process. And that is some process of some type is commenced. And that creates an estate of some type. And then creditors, or other claimants, with respect to that estate enter into that process. They open the door, if you will, and enter into that process if they choose to assert their claims.

Now with respect to those claims there is no right to a recovery until the end of that process when the Court or whatever appropriate authority determines that there is a right to that recovery. In this case, as far as I can determine, there is no suggestion of any effort to obtain an affirmative recovery against LBHI or LB Asia, they are in the midst of an insolvency proceeding, and the issue is what will be the distribution on the claim of LBHI or LB Asia. Now, I've admitted I know none of the details, but it strikes me that it's not an uncommon situation, it is precisely in a general way the sort of situation that is faced in insolvency

proceedings around the world, hence the concern.

And I believe the case law in discussing offensive or defensive, you can get bogged down in what is the meaning of offensive of defensive, and I would submit that if you ware not seeking an affirmative recovery, but you are just being heard in that proceeding with respect to the claim that has been asserted, then it's a wholly artificial distinction to allege whether or not there's some concept of allowance in the middle of the process that you have chosen to enter.

Your Honor, I'll also just address for a moment Mr. Krasnow's comment that we really shouldn't be concerned because we are -- we're not affecting the jurisdiction of a court here, I mean, we're not saying Court, you can't do this. But, in fact, if there is an improper affect on creditors and there are many with many claims in many proceedings, then, in fact, if those creditors cannot or will not or are concerned about bringing actions that they are lawfully entitled to bring, then foreign courts and other tribunals will not, in fact, have the ability to make the proper determinations because it will never be brought before them.

Your Honor, finally, I am not aware that any party of the debtor has cited to any case, doesn't mean there couldn't be one, now we're in the future, any case in which a court has enjoined the actions of a creditor in a foreign insolvency proceeding in taking actions in respect of a claim that has

been voluntarily submitted and asserted in the course of that proceeding.

And for those reasons, I would urge the Court to overrule the motion. Thank you.

THE COURT: Are there others who wish to be heard on the side of opposition to the Lehman motion?

MR. O'NEAL: Your Honor, Sean O'Neal, Cleary Gottlieb on behalf of three European banks that have filed objections.

I'll make this extremely brief. We appreciate the Court's understanding as to why other creditors would be interested in this proceeding. Our point is simple, that entry of this contempt order could have broad applications outside the U.S. and we appreciate Your Honor being cognizant of those concerns. And we do understand there are situations in which creditors' actions outside the U.S. Can, in fact, impact the automatic stay. However, our concern here is that we need to proceed very carefully and the Court needs to proceed very carefully, as we know it will, in applying the automatic stay to the legitimate exercise of creditor actions outside the U.S., when those actions are actually in accordance with the applicable foreign law.

We echo Mr. Flics' concerns and the sentiments expressed in the objection. We highlight a few particular concerns which is that at this point in which I think Your Honor is fully aware, that the facts and circumstances are not

sufficiently clear to the Court to determine whether or not relief is appropriate. And we should keep in mind that it is the debtors' burden to make that showing.

It is also unclear to us whether really the Enron case on subordination, as Your Honor noted, is really applicable in this context where we are dealing with concepts under Japanese law. I think those -- and it can also be said that many of the cases that are relied upon in this Court have been cases involving U.S. proceedings, and I think we have a fundamentally different issue when we're dealing with proceedings outside of the U.S., due to comity and related concerns.

And at any rate, I think we should all keep in mind that the distinction between equitable subordination and claims disallowance as set forth in the Enron decision is not entirely clear, not all courts have come to that view, which makes sense given that the overall result is relatively the same, which is no recovery.

And then I think, finally, Your Honor, we would express concern, both about the request for relief in favor of nondebtor entities, I think that has been discussed here today. And the concern that the normal distinction that we've seen in U.S. Cases between offensive and defensive actions might not be able to be uniformly applied across jurisdictions. So I don't think the Court and the litigants should immediately jump to the assumption that that normal dichotomy that is applied in

U.S. cases really makes sense in this context.

And with that, Your Honor, I think that's all we have. And we appreciate your hearing our concerns.

THE COURT: Okay, thank you. Is there anyone else who wishes to be heard before Mr. Krasnow gets a chance to talk?

MR. KRASNOW: Thank you, Your Honor, I'll be brief.

First of all, Your Honor, we certainly take the position that creditors shouldn't be permitted to do in foreign jurisdictions what they can't do here. To allow them to do that would allow creditors of the estates who otherwise have access or the ability to get judgments outside the United States to be able to do so while creditors who may not be in the similar position to get that advantage. The automatic stay applies in an extraterritorial sense.

Secondly, Your Honor, if Your Honor accepts our view of the affective equitable subordination, which is to divert recoveries that otherwise would be made to the debtors to somebody else, that is an affirmative recovery.

Lastly, Your Honor, I am not going to argue what Japanese law is or is not, I will observe, Your Honor, that it is certainly our understanding, if I can phrase it that way and Your Honor will accept that, that the plans were not filed, either Sunrise or Shinsei's at the invitation of the court's supervisor. It is our understanding there was a deadline for the filing of plans. The plans were filed consistent with that

deadline. Yes, Your Honor, I noted in my argument, there were then opinions or briefs filed by both sides with respect to the plan that Shinsei filed. Those were filed with the court's supervisor. It's our understanding that the Court's supervisor, I analogize it to some extent, like a magistrate considers the legal issues in the plans and then makes a recommendation to the District Court. It is my understanding that there are communications that are had between the supervisor and the parties. And, in fact, I'll use understanding again, that the supervisor has reached out to Sunrise, has requested that it makes certain modifications to its plan; the Sunrise plan, totally unrelated to the issues at hand.

Having said all of that, Your Honor, we would suggest to take up with the Court's observation, that the appropriate next steps may well be that there be supplemental declarations that are filed, not by U.S. lawyers interpreting what Japanese lawyers tell them the law is in Japan, but rather that we solicit from our Japanese counsel a declaration which responds to Your Honor's inquiries, so Your Honor could better understand and, perhaps, all of us can, exactly what the process is in Japan.

Certainly, it is our view that based upon our readings of the plans that have been filed in the Shinsei plan, that what they are doing through the plan is the equivalent of an

adversary proceeding, if you will. But I know Your Honor is not going to be terribly swayed by our views in that regard. And so I think that is the appropriate and reasonable next steps.

THE COURT: That sounds right to me. I think it would be useful to the process and certainly will inform me if I have sworn declarations from Japanese lawyers who are involved in the Sunrise proceeding and who are able to provide some first-hand knowledge of what the process is all about; what has happened so far, what is currently being decided by the supervisor, and what will happen next.

I'm also fairly interested in knowing something which is almost the ultimate question. And that is who's doing the subordination, who's doing the classification? It seems to me and I may be putting too fine a point on this at the end of the argument, that if the supervisor is being given plans to consider for recommendation to the court, and the court in Japan is then is authorizing that a particular plan be distributed to creditors for their approval, that at that point Shinsei is doing nothing. At that point the court is doing something consistent with applicable Japanese insolvency law to effect an equitable distribution. That is not a violation of the automatic stay in my view.

So part of the question that I'm wrestling with is who is doing what to whom and how are they doing it?

MR. KRASNOW: Yes, Your Honor.

THE COURT: And I'd like more information on the set of questions.

MR. KRASNOW: It's our position that Shinsei through it's plan is, in fact, seeking the subordination.

But having said that, Your Honor, we will reach out to our Japanese counsel. I would suggest that since I know speaking for ourselves, I can't commit timing wise in terms of the filing of a declaration, I suspect that Mr. Trost is in a similar position, that we each speak to our respective counsel, speak to one another so that we can agree upon a date for the filing. And if we can't agree then seek the Court's advice or intervention in that regard, rather than agreeing to a date right now.

THE COURT: I think that makes sense, too.

MR. TROST: I think that makes sense. What I was going to inquire. I assume you would like one declaration by somebody and that we each have -- the lawyers ought to be able to agree or point out where the Japanese lawyers disagree as to what the process is. I don't expect that but would you -- is that what you -- you don't anticipate each of us filing a declaration?

THE COURT: Well, I, frankly, didn't have any anticipation. Although, when I said what I said, I was assuming that that there'd be two declarations. I was assuming

that there would be one from counsel for Sunrise, or for Lehman in Japan, that there would be another from Shinsei's counsel. If they could agree on one declaration that would be great, but I have a strong sense that there might be areas of disagreement.

MR. KRASNOW: I was about to say, Your Honor, we would be pleased and encouraged Shinsei adopting our views as to what the results would be here. And I accept Mr. Trost's proposition in that regard.

MR. TROST: We'll try.

MR. KRASNOW: Why don't we see -- I envisioned there would be two separate declarations. If, in fact, our respective counsel absolutely agree on their interpretation of Japanese law, it is what it is.

THE COURT: Then it suggests that it truly is a great system over there. And I'll see you next time, but I'll wait to hear from you as to when next time will be.

MR. KRASNOW: Thank you, Your Honor.

THE COURT: We're adjourned to 2 o'clock for a 2 o'clock calendar.

MR. KRASNOW: Thank you, Your Honor.

(Recess from 12:31 p.m. until 2:09 p.m.)

THE COURT: Be seated, please.

MR. KOBAK: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. KOBAK: James Kobak, Hughes Hubbard & Reed, on behalf of the SIPA Trustee. Your Honor, on our calendar this afternoon, we have two matters, one of which is uncontested, one of which is contested, and we'd propose to take them in the order that they're listed, which is the uncontested matter first, if that's acceptable to Your Honor.

THE COURT: That's perfectly acceptable.

MR. KOBAK: Good. Thank you, Your Honor. The first matter is our application for interim allowance of fees for the period February through May. This is our second interim application. As with the first one, currently in our case it's subject to a holdback of fifteen percent. The application covers the time and fees of both the trustee and my firm as counsel to the trustee. The total amount slightly exceeds 15 million dollars for the 4-month period, which, when the holdback is applied, comes to approximately 12.9 million dollars for the period. And we've also asked for expenses of approximately 132,000 dollars.

As I believe Your Honor is aware, our application received a very thorough review by SIPC, both by Mr. Caputo, their experienced counsel who's in court here today, by their general counsel and by administrative personnel.

As a result, during each month we made some adjustments to the bill, and we also had a final reduction of approximately 25,000 dollars which appears in the revised order

that we filed on the docket and that we'll hand up to your clerks.

THE COURT: I thought I saw a revision of 65,000 dollars somewhere in the application.

MR. KOBAK: I think that was during the course of the four months, and this is an additional twenty-five.

THE COURT: So now it's up to ninety?

MR. KOBAK: That's correct.

THE COURT: Okay.

MR. KOBAK: I also will just note for the record that our firm provides a ten percent public interest discount of our fees, and we also do not bill for certain expenses such as travel and late-night meals that ordinarily would be billed to other clients.

There's been no objection to this application, and it has been reviewed by SIPC, as I mentioned, and they have filed a recommendation in support of it, which, as Your Honor knows, is, by statute, subject to considerable reliance, although it's not determinative on Your Honor.

And if you'd like, I could recite all the activities that we did over those four months, but I really don't want to take the Court's time, and I think it's fully documented in our application.

THE COURT: If I actually said I wanted you to do that, what would you do? No, I don't want to hear that. I've

reviewed Josephine Wang's statement of support indicating careful review by SIPC of your application. I note the ten percent reduction in your regular hourly rates. The blended rate is reasonable under the circumstances, and obviously the efforts that have been undertaken are considerable and of value.

Mr. Caputo's here. I don't know if he wants to say anything other than --

MR. CAPUTO: Nothing further, Your Honor.

THE COURT: Fine.

MR. CAPUTO: I'll rest on the recommendation. Thank you.

THE COURT: So I think that everything is in good order, and I approve the application.

MR. KOBAK: Fine. Thank you, Your Honor. We'll hand up to your clerks an order.

THE COURT: Fine.

MR. KOBAK: Thank you.

THE COURT: Now we have the contested matter.

MR. KOBAK: Yes, Mr. Wiltenburg is going to handle that for the trustee.

MR. WILTENBURG: Good afternoon, Your Honor. David Wiltenburg, Hughes Hubbard & Reed, for the trustee. The contested matter is the motion of the Unclaimed Property Recovery Service for various forms of relief, which originally

included lifting of the automatic stay and other forms of relief.

On the -- at the omnibus hearing on June 3rd, the Court made some observations and engaged in dialogue with counsel, and the result was --

THE COURT: Mr. Wiltenburg, can you please speak up?

MR. WILTENBURG: I'm sorry, Your Honor.

THE COURT: Just boom out.

MR. WILTENBURG: Okay.

THE COURT: Make believe you're talking to a crowded courtroom.

MR. WILTENBURG: Thanks, Your Honor. I was reprising the events of June 3rd. And following discussion on that day in colloquy with counsel, the Court deferred the matter to an evidentiary hearing on the question of whether the contract in issue is or was or was not, on the filing date, an executory contract.

And to kind of shorten the story, the parties have had communications of a sort over the intervening weeks. There's been a discovery request that was promulgated by the trustee that was responded to, as we've mentioned in our papers, in a way that we felt was not really sufficient. And the parties have also filed supplemental submissions, including evidence and argument, going to the question, or several questions, but including the question of the executory character of the

contract.

Now, I should say first that in preparation for today's hearing I realized a couple of things, and one of them was the subject of a letter of perhaps an hour ago to the Court --

THE COURT: I have it.

MR. WILTENBURG: -- in which we withdrew reference to a certain exhibit pending clarification on the record as to what the true meaning of that exhibit may be. And the second item, Your Honor, is kind of a realization that the question of executoriness, if you will, in the end will not make a great difference, and here's the reason for that. If the debt was owed on the filing date, it is a pre-petition contract claim. If the contract was executory, it has been rejected by the trustee, and the result will be a rejection damages claim which is equally a pre-petition unsecured claim. So, however today's question is resolved will probably end up in roughly the same place.

Finally, Your Honor, I've, upon realizing those two points, attempted to discuss them with counsel for the moving party, without success. If the discussion had happened, it would have included our willingness to stipulate to a pre-petition claim amount in a reasonable and negotiated number.

So, Your Honor, with that preamble, if the Court prefers to go ahead with the hearing, I think we're prepared to

do that.

THE COURT: I think it will be desirable for you to talk to Mr. Batista. He's here. I see him. If you want to talk with him and you didn't have a chance to do that, is there some value in avoiding an unnecessary hearing?

MR. WILTENBURG: I would think it's been our -- it would be our preference to do that.

THE COURT: Mr. Batista, are you prepared to talk to Mr. Wiltenburg?

MR. BATISTA: Of course.

THE COURT: I suggest you do that. And I suggest you use this opportunity to talk and that, since we have, as I understand it, a long argument scheduled for -- I thought 3 o'clock, but maybe it can be accelerated earlier because I think people are in the courtroom, you can talk -- either you can listen, because it's going to be very interesting, or you can go someplace else and maybe resolve this dispute, because if it comes down to an agreed claim, that may be all that Mr. Batista's client wants, assuming the number's right.

MR. WILTENBURG: Thank you, Your Honor. I think we may step outside --

THE COURT: I shouldn't speak for Mr. Batista.

Do I understand your position correctly?

MR. BATISTA: That's right. I'm happy to talk so long as we can talk now in the jury room or chambers or --

THE COURT: Jury room, that doesn't happen in this court.

MR. BATISTA: Ah-hah.

THE COURT: We don't have juries here generally. But you're welcome to find an appropriate place to talk and come back and give me a status report in a couple of hours.

MR. WILTENBURG: Thank you, Your Honor.

THE COURT: All right.

MR. BATISTA: Thank you, Judge.

MR. KOBAK: Thank you, Your Honor.

THE COURT: That's the end of the SIPC calendar?

MR. KOBAK: Yes, it is, Your Honor.

THE COURT: And everybody who's involved in the SIPC case who would like to be excused may leave.

IN UNISON: Thank you, Your Honor.

THE COURT: Is everybody here on Libra?

(Pause)

THE COURT: Get settled. It's -- there's no hurry.

(Pause)

THE COURT: Mr. Miller?

MR. MILLER: Good afternoon, Your Honor. May it please the Court. I'm Ralph Miller from Weil, Gotshal & Manges here for the plaintiffs and movants, Lehman Brothers Holdings, Inc., known as LBHI, and Lehman Brothers Special Financing, Inc., known as LBSF. My colleague, Scarlett Collings, will be

working with me today, especially with the visual aids.

The undisputed facts in this summary judgment record show that Societe Generale made a billion dollar bet in 2006 through the Libra credit default swap agreement on pools of residential mortgages and by 2008, after those mortgage pools had plummeted in value, that credit default swap agreement had become a great liability for Societe Generale and a substantial asset of LBSF.

By late April of 2008, the transaction was feeling the effects of the economic storm that was brewing. And the assets in the special purpose vehicle known as Libra CDO were no longer sufficient to pay the projected credit protection obligations that would be due to LBSF. That condition resulted in an event of default by the Libra parties when the ratio of collateral to potential payments fell below ninety-nine percent. This default in turn activated additional protections that we're going to talk about, especially under section 5.2(c) of the indenture for LBSF and others.

When LBHI filed for Chapter 11 protection in September of 2008 and LBSF followed on October 3rd, Societe Generale tried to escape from the consequences of the deal that it made by giving instructions to terminate the credit default swap agreement on October 10, 2008. It's a very important fact that their instructions were to terminate the credit default swap agreement.

The trustee, acting for Libra CDO, followed that instruction and gave notice of an early termination date on that same day. The summary judgment record shows that this purported termination of the credit default swap agreement with LBSF was invalid because it was attempted prematurely without obtaining the necessary vote of noteholders and before the declaration of acceleration had become final. That vote of noteholders and the finalization of acceleration were both express requirements for a termination of a credit default swap agreement after an acceleration declaration had been sent.

The reply brief of the Libra parties contain some admissions that focus the issues and make them easier to summarize. Under the simultaneous briefing schedule that we have had, this hearing is the first opportunity that LBHI and LBSF have had to respond to and explain the arguments of the Libra parties as they are set out in their reply briefs. So I want to place my emphasis during the next few minutes on points from the record that have not been explained in detail in the briefs. I hope to say some things that the Court has not already seen in the briefs.

There are five topics that I'd like to cover quickly, all based entirely on undisputed evidence in the record before the Court and supported by visual aids to make this explanation move more efficiently.

First, I will use a chronology to show what the record

demonstrates about this transaction and its status at the time of the purported termination of the credit default swap agreement on October 10, 2008.

Next, I will explain why section 5.2(c) of the indenture expressly prohibited this purported termination of the credit default swap agreement on October 10, 2008 and why section 5.2(c) is a logical and important protection designed to ensure the continuation of this complex structure for the benefit of LBSF and other parties.

Third, I'll show how the record, including judicial admissions by the Libra parties in their answer in the first filed proceeding and their complaint in the consolidated adversary proceeding that was filed shortly thereafter, refutes the argument of the Libra parties in their reply brief that the declaration of an early termination date on October 10 did not terminate the credit default swap agreement.

Fourth, I will explain why the reliance of the Libra parties on section 12.1 of the indenture, as now clarified in the reply brief, is prohibited by the automatic stay and, further, why section 12.1 does not conflict with section 5.2(c) of the indenture.

Finally, I will show how the record demonstrates that enforcement of article 5 of the indenture, including section 5.2, will accomplish the intended goal of that article and many other provisions within the structure.

By keeping the credit default swap agreement alive, thus retaining it as a valuable executory contract of the estate, once that executory contract is assumed and assigned, it will preserve the original economics of this transaction, which was intended to play out over a long period of time, and the intent of the parties will be upheld.

Your Honor, we do have some visual aids, some materials; they are in notebooks with tabs. If Ms. Collings might pass those out. We've already provided copies to counsel for the defendants.

THE COURT: I'd be happy to see the visual aids.

(Pause)

MR. MILLER: If we might, Your Honor, let's start, as seems logical, with tab 1, which is a chronology. Let me begin this discussion of the status of the transaction by explaining what had gone before. Now, this is not exactly to scale because we needed a lot of text, but it does try to represent generally things that occurred in proximity to each other or as closer to each other than things that were a long time apart.

First, the record shows that the credit default swap agreement was executed with a related indenture and other parties -- other documents by the parties on October 17, 2006.

Now, we already have up a transaction diagram, which is tab 2. This is a slightly revised version of a diagram that was used earlier in a hearing on approval of the letter

agreement. The only changes are some color changes, and the name Societe Generale has been added to clarify who the senior swap counterparty is.

As you know, the Libra CDO is a special-purpose entity created under the law of the Cayman Islands that entered into the credit default swap agreement with LBSF and also took in investments from noteholders. It also entered into the unfunded senior swap agreement with Societe Generale. And while metaphors are always difficult, it may be helpful to think of the senior swap agreement as sort of like a letter of credit that stands behind the obligations of Libra CDO.

The economic engine that drives this whole transaction is the credit default swap agreement with LBSF, which is the blue square in the upper left-hand corner. Without that agreement, this would be much like an inefficient mutual fund with very high costs. While some of these investments were put into things like guaranteed investment accounts and cash, many were put into pools of residential mortgage. This mortgage is -- this is what the noteholders put in.

But the reason that those investors were willing to do this was that LBSF needed credit protection on exposure to mortgage pools and agreed to pay a substantial premium, tens of millions of dollars a year, keyed to mortgages that could in theory last up to thirty years.

That premium added to the investments and the

investment return, less the fees, produced a return that would be attractive to the noteholders if the mortgage pools continued to perform as expected. If not, everyone understood that at that point LBSF would receive what amounted to insurance-like protection for diminution in value of those residential mortgage pools.

The special-purpose vehicle Libra CDO provided insulation, so the assets that were at risk were only those that were put into the pool, including the promise of the senior swap counterparty Societe Generale to pay money, if necessary, into that vehicle.

As I will explain, it's important to note that the senior swap counterparty Societe Generale is not a noteholder. And the documents do not make any provision for payments from the senior swap to go to the noteholders. The senior swap exists for the protection of LBSF, and that becomes critical in interpreting the documents.

Looking back at tab 1 again, the chronology, the collateral purchased with the proceeds of these notes, which included interest in residential mortgages, dropped in value as the mortgage crisis came upon the country. And the so-called reference obligations, which were also keyed mostly to residential mortgages, performed poorly so that by April 30th of 2008 there wasn't enough collateral to cover all the obligations that were expected to be due to LBSF under the

credit default swap agreement.

As a result, the trustee issued a notice of an event of default on April 30, and that is summarized in this first yellow box. It states, and this is a summary, that basically the collateral had dropped below ninety-nine percent of the sum of potential amounts due to be payable by Libra.

Two days later, on May 2nd, the trustee declared acceleration of the notes. This is the second yellow box. This declaration of acceleration had a number of consequences. These events occurred because the Libra CDO was undercapitalized for the special purpose that gave rise to its existence. This was like an insurance company, basically, that was on the brink of receivership for having inadequate assets.

Now, this is important to understand, Your Honor, because this situation does not occur in many of the transactions. This was a default on the issuer side. At this point, LBSF and LBHI were performing fully, and there was no problem; they were entitled to all of their money.

Under the indenture, which I will talk about further in a minute, section 5.2(c) became operative. And tab 3, which is now going up, is the quote of section 5.2(c). Section 5.2(c) says, "The Issuer", and that includes the trustee acting for the issuer under the documents, "shall not terminate the senior swap agreement, the credit default swap agreement or any hedge agreement in effect immediately prior to a declaration of

acceleration unless the liquidation of the Collateral has begun and such declaration is no longer capable of being rescinded or annulled."

A lot of ink has been devoted to this, but I think the parties are all in agreement that there was a declaration of acceleration, and immediately prior to it there was a senior swap agreement, that's the one with Societe Generale, and there was a credit default swap agreement, and that's the with LBSF.

So at that point the issuer had a promise not to terminate those until two things happened; both of them had to happen: There had to be a beginning of liquidation, and the declaration of acceleration had to have become finalized.

The summary judgment record shows that neither of those conditions have been met, but the easiest one to deal with here is that the liquidation of the collateral never began. And the reason it didn't is that there were provisions that required a vote.

If you turn to tab 4, we have collected a number of similar provisions, 2-5.2(c), that are scattered throughout the documents that are all designed with a common purpose, and that is to keep this complex structure functioning if one party has a problem or an issue arises. For example, the first two provisions there deal with replacement of the calculation agent if it resigns, and replacement of the collateral manager if it is removed or if it's terminated.

The next page there promises that LBSF will make no attempt to place Libra CDO into bankruptcy, which would disrupt the process. And then there's a provision that has to do with resignation or removal of the trustee, to replace the trustee. There's a provision on the third page of that tab, that's actually quoted, that deals with retaining the collateral, securing the notes. And then there is a provision that allows LBSF to assign and delegate its duties to one or more institutions without consent, if necessary.

Let's go back to section 5.2(c) now, if we could. The Libra parties agree with LBSF that liquidation could not begin unless the trustee determined there was enough collateral to discharge all these notes, which didn't happen, or the noteholders of two-thirds of the so-called controlling class and two-thirds of other classes direct a sale of the collateral. This is a result of conditions in section 5.5(a) of the indenture, as explained on page 15 of LBSF's motion for summary judgment. That shareholder -- excuse me, noteholder vote never occurred.

Let's stop for a minute to be sure it's clear in the context of this transaction why this voting requirement is so important. The record shows that these were pools of mortgages that could continue in theory, as I said, for up to thirty years. Many of them were thirty-year fixed mortgages. Over time, this collateral could become worth more or less, and the

reference obligations could perform better or worse.

If government programs to avoid residential foreclosures had great success, for example, these pools could increase in value, and the losses to the junior noteholders, which at this point were going to be very substantial, could decrease. Section 5.2(c) gave those noteholders a vote on whether liquidation was going to occur or the transaction was going to continue.

It's an undisputed fact that the noteholders never provided the needed votes. So the liquidation, which is the first condition of 5.2(c), never began. Section 5.2(c) also gave LBSF time to take remedial steps before the credit default swap agreement was terminated.

One consequence of the proposal of the Libra parties is to basically ignore section 5.2(c) so that the noteholders would be disenfranchised, this vote would be necessary and so that LBSF would lose any time to deal with this crisis that had arisen not from its fault but from the failure of the issuer to have enough collateral.

Now let's go back to tab 1 and look at the timeline a little more, if we could, Your Honor. While the protection of 5.2(c) was in effect, LBHI entered Chapter 11 on September 15th. On Friday -- actually, on Thursday, October the 2nd, LBSF missed a premium payment. And the following day, on Friday, October the 3rd, notice of a potential event of default

was sent. And that is summarized in the third yellow box on the chronology. And what that said was that you're notified "that a potential event of default has occurred pursuant to Section 5(a)(i) of the Agreement as a result of the failure by the Company to pay the fixed payments due to be paid by the Company to Libra CDO on October 2, 2008. Such potential event of default will become an event of default if not remedied on or before the third local business day after the date of this notice." That was Friday, October the 3rd. Something else very important happened on Friday, October 3rd: That was when LBSF filed for Chapter 11 protection.

So before this failure to pay on the 2nd ever ripened into an event of default, the bankruptcy intervened. This timing is important because the Libra reply brief now makes it clear, as I will explain later, that the Libra parties seek to rely on this missed payment as a justification for termination through a rather complex route that goes through section 12.1 of the indenture. We didn't understand that until the reply brief. We thought there were other grounds that they were arguing. But that has now come into focus, and so one of the things that I will explain a little bit later is why that unripened potential event of default cannot be used, for reasons I think the Court's aware of, because of the automatic stay.

Moving forward to the fourth yellow box in tab 1, the

critical day for the summary judgment motions is October 10, 2008, when the record shows that Societe Generale instructed the trustee to terminate the credit default swap agreement, and the trustee issued a notice of an early termination date.

If you could turn to tab 5, this is the trustee's notice to noteholders on Halloween 2008, October 31, and it is a really critical document that we believe cannot be refuted. And it says in the callout there, "On October 10, 2008, the senior swap counterparty, as the controlling class," parenthetically, that's Societe Generale, "directed the Trustee", at that time, that was LaSalle, its head successors, it's one of the defendants, "to terminate the credit default swap agreement. And the Trustee delivered a notice of termination of the credit default swap agreement to LBSF establishing October 10, 2008 as the 'early termination date' under the credit default swap agreement."

Now, an interesting thing has happened, and that is that over the course of this case the interpretation of the Libra parties of what happened on October 10 has changed. And tab 6 is our effort to summarize that evolution of their position. And the interesting thing is part of it's in the record and part of it's not.

If you go to the very last box, you will see what I anticipate you're going to hear in a few moments. This is the current position, as we understand it, of the Libra parties.

They argue, and this is the last blue box in their reply brief, the Libra parties argue that "the October 10, 2008 notice of termination effected termination of all outstanding transactions, not termination of the Agreement," referring to the credit default swap agreement.

So they've now decided to try to draw a distinction between terminating all the transactions and terminating the agreement, despite the fact that the noteholders were told on October 31st, a contemporaneous document, that the trustee said terminate the agreement, and the trustee did terminate the agreement.

Now, let's see how those facts would interact with section 5.2(c). This is another very helpful excerpt, if you go to tab 7, from the reply brief. This is the Libra parties. They say, "The Parties agree that between acceleration and liquidation, Section 5.2(c) prohibits termination of the credit default swap agreement in certain circumstances. The Parties agree that acceleration has occurred and that liquidation has not begun." Stopping right there, they're admitting that they are in that operative period where 5.29(c) has put a lock on them. "The sole dispute", they say, "is whether Section 5.2(c) applies to both termination of the transactions (a term that is not mentioned in 5.2(c)) as well as to the framework 'credit default swap agreement' (the term that is mentioned is 5.2(c)), under which the distinct transactions were effectuated."

So we actually have quite a bit of agreement between the parties. Section 5.2(c) was effective, it was operative, it prevented termination of the credit default swap agreement. They say the sole issue is what really happened on October 10. Did they terminate the credit default swap agreement, which would be prohibited, or just the transactions under it? That's what they say is the sole dispute.

Well, fortunately the record is pretty clear on that. If you'd turn to tab 8, we have some excerpts from the answer filed by the Libra parties in this case. And in paragraph 4, the Libra parties admit that Libra terminated the credit default swap agreement. In paragraph 30 of their answer, they make that much clearer. They admit that on October 10, 2008, the trustee declared October 10, 2008 to be the early termination date for all outstanding transactions under the credit default swap agreement, thereby terminating the credit default swap agreement. This actually is a perfectly accurate statement of what the record shows. We'll demonstrate it's also a perfectly accurate record of the industry practice. It is not, however, what they are going to try to argue to you, I predict, in a few moments is what really happened.

So we have a very interesting contrast between the summary judgment record, which the answer obviously forms a part of, and the position that's being taken in the reply brief.

Now, there are other judicial admissions in the record, in the complaint, and that is in tab 9. There are excerpts from the complaint. You recall that there were two simultaneous, almost simultaneous, adversary proceedings: LBSF and LBHI filed first, and later that same day the Libra parties filed. And in paragraph 4 of their complaint, they admit that Libra terminated the credit default -- I'm sorry, I apologize, I'm reading from the wrong tab. In paragraph 10 they admit -- or they say that Libra had a clear right to terminate the CDS agreement. Paragraph 42 of that complaint says the Libra trustee, on October 10, 2008, delivered to LBSF a notice of termination of the CDS agreement, specifying the same date as the early termination date of the CDS agreement.

Paragraph 48 says the CDS agreement was, on October 10, 2008, duly and irrevocably terminated in all respects. This is their complaint. And their prayer for relief in that complaint, and what they're seeking a summary judgment for, is respectfully request that this Court issue a declaration that the termination of the CDS agreement was valid and the automatic stay does not bar or invalidate the termination of the CDS agreement and that they are entitled to terminate the CDS agreement.

So this timeline that we had done in tab 6 puts these changes of position in perspective and shows that, beginning with the first filings in this case, the position of both

parties have been that October 10 was the date when the credit default swap agreement was purportedly terminated.

It is important to note that this Court has taken action based on this characterization of events. We've talked about the first three boxes on this timeline already. The fourth box has to do with the pre-motion request to Your Honor from the Libra parties for their right to file their summary judgment, which had to do with whether we have a summary judgment and we have fact disputes. And at that point, they asked for the right to seek a declaratory judgment that, quote, "termination of the CDS Agreement was valid under the express terms of the CDS Agreement".

So these judicial admissions about the October 10, 2008 notice are all inconsistent with the new argument in the reply brief that the Libra parties now say is the sole issue on the application of 5.2(c).

How binding are these admissions in a summary judgment proceeding? Well, tab 10 contains some cases that deal with judicial admissions, and I won't read them, but they all agree that admissions in the answers and admissions in the answer and counterclaim are binding throughout the proceeding.

However, Your Honor, I want to make it clear that this record doesn't really require the use of these admissions because the facts all show that what the parties said was happening was the termination of the credit default swap

agreement.

We also have added, Your Honor, in this set of visual aids an excerpt from a leading treatise on derivatives by Simon Firth, an English author who has done a lot of writing on this. This is revised in 2009. I actually commend all of this to everybody's reading because Mr. Firth does a good job of explaining how these agreements work.

But if you go to the last page of tab 11, Mr. Firth describes what he calls closeout following an event of default procedure. And he says, quote, "If an event of default occurs, the nondefaulting party may, at any time while the event is continuing, close out the agreement and all the outstanding transactions under it. The closeout is affected by the giving of written notice to the defaulting party specifying the date on which the closeout is to take effect. This is referred to as the early termination date."

Now, you're going to hear in a few moments that ISDA, the International Swap Dealer's Association, says "You know, our agreements don't have any provision to terminate the agreements themselves; we terminate only transactions." And that's true. The agreement does not have a way to terminate itself. And the truth of the matter is the ISDA master agreement has to continue because it defines rights going on after the agreement is terminated.

I tried to think of some metaphors that work on this,

Your Honor, and I think probably the metaphor that's the most analogous to this is a group health insurance policy. If you think of a group health insurance policy, it has certificates under it.

THE COURT: It's a very timely analogy.

MR. MILLER: Perhaps, Your Honor. But a group health insurance policy --

THE COURT: Not a happy one, but a timely one.

MR. MILLER: A group health insurance policy has certificates issued to individuals. And those certificates are basically like separate policies of insurance, but they're all governed by the master. If you can imagine that that master policy said this can't be -- the policy and coverage cannot be terminated for a year, and the insurance company said "Well, that's okay, we're going to go ahead and just terminate all of the certificates, we'll leave the policy in place," I think almost everyone would agree that you can't do indirectly what you're not permitted to do directly.

And we actually have a case that we can talk about later if we need to, but there are some cases that deal with this in other contexts. In this instance, the record is clear that the parties all dealt with this, and the record shows that on October 10 the early termination date was declared for the credit default swap agreement, including the transactions under it.

By the way, we also have in tab 12 a case where Judge Gonzalez, in the Enron case, talked about closing out of credit of swap agreements. And again, he used the same convention. Remember, all of these are ISDA masters, including the senior swap. So when you talk about terminating the senior swap, which is part of 5.2(c), you're also talking about an ISDA master that has no provision for terminating it by itself.

We have a tab in a highlight here from the opinion by Judge Gonzalez where he says, "Swap agreements typically provide the nondefaulting counterparty the right to terminate the agreement upon the other party's default." And he cites Collier. "Once terminated, a swap agreement typically provides that all transactions between the parties are cancelled, and a single net amount will be due based upon market conditions at the time of termination." Again, that is precisely the mechanism that was used here and precisely the mechanism that the indenture was addressing in section 5.2(c).

So in summary, the record shows that the conditions for application of 5.2(c) were fully effective. And actually, the Libra parties concede that because there was a declaration of acceleration, there was a credit default swap agreement in effect immediately before that. That credit default swap agreement became protected. It required two things to happen. Neither of them have happened. That is, the liquidation beginning or the declaration of term of acceleration no longer

being capable, rescinded or annulled. But we really only have to stop with the first one in this case because we all agree there's been no liquidation.

So if 5.2(c) applies, the October 10 termination cannot stand. And again, the summary judgment record shows, in the words of the answer on October 10, 2008, "The trustee declared October 10, 2008 to be the early termination date for all outstanding transactions under the credit default swap agreement, thereby terminating the credit default swap agreement." So we think that the summary judgment record clearly establishes a provision, failure to comply with the provision, and no way around that.

However, the Libra parties have come up with a number of creative arguments, as one might expect, for why we should still pay no attention to section 5.2(c), and I want to deal with a few of those rather quickly.

First of all, they say, "Well, the indenture should not affect rights under the ISDA master agreement." Well, as a matter of logic, this actually doesn't make any sense standing alone. As we all know, there are all sorts of undertakings by parties that they won't do certain things they have a right to do: shareholder voting agreements, covenants not to sue. One can contractually agree to withhold a right that it has. And there's been no argument as to why that would not be the case.

They do have a variant of this that says that there

were integration clauses in the ISDA master and the indenture. But we've cited New York cases -- and this is governed by New York law -- on pages 11 and 12 of our reply brief, that show that all documents executed on the same date as a part of a common transaction are treated as a single agreement under New York law, even if there are merger clauses or even if one contract states that there are no other contracts between the parties. So the law is really quite clear in New York that these are treated as a single document.

But we actually have a very clear and compelling case on this dealing with an SPV swap transaction from Judge Denise Cote in this district. This is a case that's sometimes been called the Rabobank case. In that case, Judge Cote read the indenture together with the ISDA master and found that conditions in the indenture prohibited termination of the swap agreement which was there called a hedge agreement.

And on tab 13 we have some excerpts from the Rabobank case which is cited throughout the briefs, but it's a long case. As Judge Cote said on page star-12, referring in this case to the indenture and the ISDA master which now the Libra parties say you should not read together.

She says, "These are carefully structured documents with intricately interwoven and balanced duties and rights. They spell out the parties' obligations in exquisite detail. They exert minute control over the collateral manager and the

trustee. The participation of a hedge counterparty in the enterprise is a material component of its business, and the termination of that participation was a matter of consequence to all parties." That hedge agreement was the effective swap agreement like the credit default swap, it just happened to be a hedge.

And we also cite another quote from that case where Judge Cote says, "The agreements at issue in this dispute, however, are complex agreements effectuating complex transactions. The best way to protect all of the parties' carefully negotiated rights is to give the terms in these agreements their clear and unambiguous meaning in the context of the transaction as a whole." And that's precisely what we are asking the Court to do.

We think that takes care of this argument. And they're going to see some arguments, I believe, coming out that say well, there are various places where the indenture says this does not control over that, or that does control over this and so on. But we really don't have a conflict situation within the indenture here, as I'll explain in a moment. What we have here is their argument that you disregard the indenture and look only at the ISDA master and its confirmations.

There's another creative argument by the Libra parties to try to escape from the express terms of section 5.2. They claim that article 5 should be interpreted to be only for the

protection of the noteholders. Now, there's absolutely no textual support for this position, and it's squarely inconsistent with a statement in the indenture on what its purpose was.

If you look at tab 14, we have page 1 of the indenture. This is the beginning of the indenture. The preliminary statement says the co-issuers -- that's Libra CDO Ltd. and another entity that's considered a co-issuer that's basically a variant of Libra CDO, it says the co-issuers are duly authorized to execute and deliver this indenture to provide for the issuance of the notes. And then it says, "All covenants and agreements made by the co-issuers herein are for the benefit and security of -- ", and then it has a list of parties, including the credit default swap counterparty, that's LBSF. Notice it doesn't say "unless otherwise provided, some covenants". It says "all covenants and agreements are for the benefit of all of these parties".

There's also express third party beneficiary language in a couple of documents that makes it clear that although LBSF did not sign the indenture because it wasn't contributing assets to that, it is a third party beneficiary. This is tab 15. The credit default swap agreement schedule, which is one of the attachments to the ISDA master, says -- and we've substituted the terms because it's Party A, Party B stuff -- "Libra agrees with LBSF so long as either of LBSF and Libra has

or may have any obligation under this agreement that LBSF shall be an express third party beneficiary of the indenture."

There's a number of references, by the way, between the indenture and the ISDA master which is further evidence that they're a single transaction. And then the indenture itself in section 14.8 says "The credit default swap counterparty" -- that' LBSF -- "shall be a third party beneficiary of each agreement or obligation in this indenture." Each agreement or obligation.

So this argument that you should just disregard section 5 -- article 5 and section 5.2 because it obviously was not intended to help LBSF, even though it would help LBSF here, that has no support in the text or the record.

There's another very important point. And if we go back to 5.2(c) for a moment. There are three agreements listed in section 5.2(c), and one of these is the senior swap agreement with Societe Generale. As I noted before, the senior swap agreement does not pay noteholders. It exists to protect LBSF. The Libra parties argue that the drafters only intended for article 5 to benefit noteholders and didn't intend to benefit LBSF. If so, there would be no reason to include the senior swap agreement as an expressly listed and protected agreement in section 5.2(c).

The fact that the senior swap agreement is protected is compelling evidence that's consistent with the statement in

the preamble, and the third party beneficiary language that this provision, like all the others, was for the protection of all the parties, including LBSF. So we think the record takes care of the argument by the Libra parties that you can ignore section 5.2(c) because LBSF shouldn't be able to rely on it.

We are near the end, Your Honor, but there is one more argument that has been difficult for us to understand.

THE COURT: Did I look like I was ready for you to end? I'm enjoying this argument; it's fine.

MR. MILLER: Oh, thank you, Your Honor.

THE COURT: Keep going.

MR. MILLER: I just wanted to give you assurance that the end is in sight.

THE COURT: Okay. That's helpful.

MR. MILLER: This argument is one that has been in their briefs, but we, frankly, have not been able to make sense of it, and I think I'll explain to you why in a moment. The Libra party's claim that the issuer was required to terminate the credit default swap agreement under section 12.1(b) -- which is in tab 16. An excerpt is there and there's more of it.

It says, "The issuer will: (b)(i) sell, terminate, or otherwise liquidate any defaulted security" -- that's a defined term -- "within one year after the related collateral debt security" -- another defined term -- "became a defaulted

security". As I will demonstrate in a moment, it's very difficult to figure out what that's trying to say.

But the Libra parties have finally told us what they were saying there in their reply brief, and that is in tab 17. "As to section 12.1(b) of the indenture, the parties agree that LBSF failed to make a payment due on October 3, 2008, and that it did not cure the failure within three business days after notice." Citation omitted. "There's no dispute that the payment default rendered the transaction's defaulted securities under the indenture."

Oh, that's not true that there's no dispute, Your Honor. There's a big dispute over that. Now that we understand that this argument is based on a payment default on the day before the bankruptcy filing that had not ripened and would not ripen for three days, that changes the argument very substantially.

And the reason it was so hard to figure that out, if I might take the Court on a brief scavenger hunt through the definitions in the indenture. If you look at tab 18 -- I'm not going to go through this in painful detail -- there's a definition of what's called synthetic security. And the synthetic security actually is another term that's very close to the term transactions. It has to do with the referenced obligations here. And that chases through definitions of defaulted security, and that's the third tab at 19 and 20. And

you can have a synthetic security that becomes a defaulted security if it has what is called -- this is my favorite definition we're going to talk about today -- the synthetic security counterparty defaulted obligation.

And that handy term that we all use all the time "synthetic security counterparty defaulted obligation", on page 75, turns out to mean that the synthetic security counterparty -- that's LBSF -- has defaulted in the performance of any of its payment obligations under the synthetic security. That's a long way of saying premium payments.

So this whole 12.1(b) argument is based on the failure to pay premium. The record shows the only failure to pay premium had not matured into an event of default, wasn't actually due when the bankruptcy intervened, and as the Court I think already knows, but we have some cases on it, when you have a cure period that is still in effect on an executory contract and a Chapter 11 filing occurs, the cure period is frozen in time and the contract remains executory.

And we have some cases on that at tab 19. Because, again, we didn't have a surreply, we're submitting these authorities at this time in the oral argument. And as the, for example, the Masterworks case of '89 says, "The intervention of bankruptcy within the cure period preserves the executory nature of the agreement, notwithstanding the pre-petition notice of termination for failure to make required royalty

payments." And I think this is a doctrine the Court is familiar with.

So the bottom line, now that we have the Libra reply, is that section 12.1(b) was never activated because the only fact that could be shown that would activate it was the failure to pay premium as LBSF was virtually on the cusp of bankruptcy. And therefore, we really don't have this fact.

But I do want to point out two other reasons why you shouldn't worry about 12.1(b) even if this were not factually irrelevant. First, if that section had become operative, there's no conflict with section 5.2(c) because 12.1(b) has a one-year time period to basically clear up this deadwood, which is what it's talking about. That one-year time period is not run now, and it's not going to be necessary because it's no longer going to be a defaulted security if assignment and assumption occurs and the premium shortfall would be made up. So essentially, there is one year to fix these problems for the trustee. They were not obligated to do it any sooner than one year. We've got until at least October 10th, even if the bankruptcy had not intervened.

The other point is that -- the Court's familiar with and our brief cites that the rule that general provisions are controlled by specific provisions. And 12.1(b) is a very general provision that has to do with the housekeeping of clearing out defaulted obligations. 5.2(c) is very specific.

It names three kinds of agreements. It has a very narrow time window. It says, "During this time window" -- and it's a crisis window; it's when the transaction is in danger -- "certain protections arise".

I do want to make one other point, Your Honor, that I think has been clear, and that is that we have a unique situation here of sort of one default followed by another default. The issuer side of this transaction went into default and that activated certain protections that were very important. Then the other side went in default because basically, as we all know, the whole financial system was in a downward spin. And these things were all driven, basically, by the mortgage crisis.

This is a very logical thing to say that the protections from the first default don't go away because of the second default. Nothing in the agreement suggests that it was set up to do that. The protections from the first default continue; they were operating. And they actually save us from the second default because if they're read as intended, they allow the transaction to be restored to operation, which is precisely what was intended.

So recognizing limited time, I won't try to go to other points in the voluminous briefs now, but I would like to have a chance to respond briefly to the arguments that the other parties will make. I've tried to incorporate both the

discussion of the motion of summary judgment for LBSF and LBHI, and the response to the counterpoised summary judgment from the Libra parties.

In summary, the record shows that the purported termination on October 10, 2008 was, as judicially admitted, an effort to terminate the credit default swap agreement, and it was prohibited by section 5.2(c). There is no conflict with section 12.1(b) of the indenture because that section, based on an alleged missed premium payment on October 2nd, never came into effect as a result of October 3rd Chapter 11 filing of LBSF.

Finally, the enforcement of section 5.2(c) will preserve this valuable asset for the estate and its creditors as well as holding out the possibility that the noteholders are going to receive more if the collateral has a chance to play out over time as expected.

Of course, Societe Generale will not be happy with that outcome. But it is not being asked to do anything more than to honor its bargain. Section 5.2(c) is not a penalty clause. If the Court enforces the terms of section 5.2(c), Societe Generale merely has to perform on the promises it makes. It merely has to pay up on the bet it lost.

For these reasons and others in the motion for summary judgment of LBSF, the summary judgment should be granted for LBSF, declaring that the purported declaration of an early

termination date on October 10, 2008 was invalid, and that the credit default swap agreement is an executory contract, it's eligible for assumption and possible assignment by LBSF as a debtor.

There are some other issues in our pleading, Your Honor. You never reach those if this is all set aside, so we don't need to talk about those now. There are issues in the pleadings that deal with what happens if it were a valid termination. We had to figure out what to do with the priority of payments. I want to note that they're there but they're not before this Court. We actually have time for those in the Sapphire, AFLAC, and other proceedings later, but they're in the background here.

For the same reasons that the October 10, 2008 designation, really termination date, should be set aside in the summary judgment of the LBSF and LBHI, the cross motion for summary judgment of Libra parties should be denied.

I'll be happy to take questions from the Court.

THE COURT: I don't have questions. It was a very instructive presentation, and I don't mean by suggesting that that I'm not going to be instructed by hearing from your adversary.

I do want to inquire as to whether, just in terms of appropriate balance, it makes sense to hear anything that committee might want to say.

MR. MILLER: Yes, we'd be happy. We would like the committee to speak next, Your Honor.

THE COURT: It seems to me that the committee should speak now and then Libra can speak as to all of its adversaries at once.

MR. WINSTON: Good afternoon, Your Honor, Eric Winston of Quinn Emanuel on behalf of the creditors' committee. In the courtroom today is my colleague Dan Cunningham. And on behalf of the committee, we appreciate the opportunity to speak. We will not go very long. I do not intend to duplicate the presentation that you just heard.

Nonetheless, the committee does fully support the motion for summary judgment filed by the Lehman estate and fully supports the estate's opposition to the Libra defendants' cross motion for summary judgment. The detailed and well argued briefs by all the parties reflect the importance of the issues in this adversary proceeding. And the Lehman debtors have cogently explained why the estates are entitled to summary judgment.

We are here today because the committee's role is nonetheless distinct from the Lehman estate. The committee represents the constituency that was not a part of the negotiations of the Libra transaction documents and that did not have any role in the events related to the Libra transaction that occurred prior to the commencement of these

adversary proceedings. That same constituency, the unsecured creditors, will benefit from the prosecution of this litigation or will bear the ultimate burden -- not Lehman -- of the LBSF defendants are able to enjoy the windfall that is the heart of their position.

Thus, the committee has actively participated in this adversary proceeding, including filing two briefs, for a simple and obvious reason. At stake are hundreds of millions of dollars that can be made available to the estate's creditors by realizing on this estate asset, which is at bottom an executory contract that can and should be assumed and assigned.

As I said before, I don't intend to duplicate the presentation of Mr. Miller, which presentation does firmly confirm that the Lehman debtors are entitled to summary judgment. Instead, I will highlight for the Court two primary issues of contention that are raised in the Libra defendants' reply brief.

First, does section 5.2 of the indenture limit the credit default swap agreement's termination provisions in section 6.8 thereof? And second, is there any merit, for purposes of this litigation, to the purported distinction the Libra defendants attempt to make between the term transactions under the credit default swap agreement and the credit default swap agreement itself?

Let me start with section 5.2(c). As Mr. Miller

firmly demonstrated, the plain language limits the ability of the issuer, or in this case the trustee, to terminate the credit default swap agreement. In its reply, Libra asserts that the indenture does not modify the credit default swap agreement's termination rights because there is an absence of any cross-referencing language, even though the schedule to the credit default swap agreement does contain other cross references.

The straightforward response to this argument is that New York law firmly recognizes that related documents executed contemporaneously can form a single contract such that the terms in one can govern, limit, or provide meaning to the terms in another writing. Here these two agreements are closely tied together. Under the indenture, LBSF is not only a third-party beneficiary, it is also a secured party.

And the Rabobank case that was mentioned earlier is persuasive on this point. There the Court held the term liquidation, as used in a terms supplement to the indenture, would be incorporated into a hedge agreement to limit the hedge counterparty's rights. This is so even though the term liquidation, as used in that indenture, did refer to other things, such as asset sales. The Rabobank court was not persuaded that the fact that liquidation could have multiple meanings in the indenture meant that it should refrain from incorporating the term into the hedge agreement to limit the

hedge counterparty's rights.

Thus, section 5.2(c) of the indenture can and does limit the rights of the Libra defendants to terminate the credit default swap agreement, including the limitations on section 6.8 of that document.

Now, let me turn to the argument regarding the distinctions between transactions versus the credit default swap agreement. The Libra defendants appear to be arguing that section 5.2(c) is inapplicable because the section refers only to the termination of the credit default swap agreement when, according to them, all they sought to terminate were all of the transactions under that agreement. And it's been demonstrated by the visual aids that that is just not in comport with the record. The October 31 notice expressly states that the controlling class under the indenture directed the trustee to terminate the credit default swap agreement and the October 10, 2008 notice was a termination of that document. No mention of this purported distinction in that October 31 notice.

And as pointed out, Libra's answer twice admits that on October 10 the defendants purported to terminate the credit default swap agreement. This is a judicial admission, one that is fully consistent with the defendants' conduct prior to the briefing of the summary judgment papers.

Nonetheless, there are a few other arguments raised in the reply that do require some analysis and response. One,

Libra argues in its reply that terminating all the transactions would save time and expense of re-executing the ISDA master agreement scheduling confirmations if the parties were to initiate a new transaction.

There's two obvious responses. One, this is an unworkable argument in the context of a structured finance transaction such as Libra since there is virtually no chance that the parties would initiate a new transaction after terminating all existing credit default swap transactions. Indeed, while in the reply the defendants contend that there is an economic distinction between the term transactions and the credit default swap agreement, in the original cross motion, at page 58, they concede the economic effect of the two is exactly the same.

Libra next argues that the indenture separately defines a credit default swap agreement and transaction, and that is true. But as explained at page 8 in our opposition, the need for separate definitions makes sense when it was necessary to describe the economic or legal terms or one or more of the transactions, but that does not mean that the term transactions has any independent significance from the term credit default swap agreement in section 5.2(c) of the indenture. In other words, one cannot terminate the credit default swap agreement without also terminating all the transactions thereunder.

Which leads me to the last point. Libra ignores the inclusion of the senior swap agreement in section 5.2(c), and I think that's fatal to their argument. Section 5.2(c) provides that the issuer may not terminate the credit default swap agreement, or among other things, the senior swap agreement. An attempt to distinguish between the termination of a master agreement versus just the transactions arising thereunder, in the context of section 5.2(c), makes no sense with respect to the senior swap agreement.

The senior swap agreement is, just like the credit default swap agreement, based on an ISDA master. The indenture does not in any way distinguish between the senior swap agreement on the one hand and any transactions thereunder on the other hand. Thus, when section 5.2(c) states that "the issuer shall not terminate the senior swap agreement", it can only mean that the issuer shall not terminate any transactions thereunder. And it would not be sensible to say the same words have a different meaning with respect to the credit default swap agreement.

Your Honor, I promised I wouldn't duplicate Mr. Miller's presentation, and I've hopefully fulfilled my promise because I've finished my presentation.

THE COURT: All right. Thank you.

MR. WINSTON: Unless the Court has any questions, I'll sit down.

THE COURT: Thank you very much.

MR. WINSTON: Thank you.

THE COURT: I think it's time for Libra.

(Pause)

THE COURT: Do you have any visuals?

MR. WOLOWITZ: Excuse me, Judge?

THE COURT: Do you have any visuals?

MR. WOLOWITZ: We do, Your Honor, and in fact we've got for the Court some eight and a half by eleven copies of those visuals for the Court, copies of which we've given to Lehman counsel.

THE COURT: Fine.

MR. WOLOWITZ: This is my colleague, Christopher Houpt, who will be assisting me with the visual aids.

(Pause)

THE COURT: Am I supposed to be getting a book?

MR. WOLOWITZ: Do you have a -- oh, Your Honor, do you have the copies of the eight and a half by eleven? We can hand up a copy to Your Honor.

Chris, would you --

THE COURT: I just don't know if you want me to have them or not, or you want to --

MR. WOLOWITZ: Yes. Thank you, Judge.

THE COURT: Because if you want me to have them, now's the time to give them to me.

MR. WOLOWITZ: And Your Honor, we also have -- I know you've had plenty of paper in this case, but we have those, within the context of the entirety of the agreements, tabbed appropriately for the Court --

THE COURT: Okay, thank you.

MR. WOLOWITZ: -- both the credit default swap agreement and the indenture.

Your Honor, Steven Wolowitz, Mayer Brown LLP for the Libra parties, Libra CDO, Bank of America, and Societe Generale.

Your Honor, when LBHI went into bankruptcy, there is no dispute that that was an event of default under the credit default swap agreement as to LBSF. That's one of the undisputed facts in this case. Lehman is seeking to avoid the consequences of that default which are stated in the credit default swap agreement and the exercise of which is protected by a statute.

This case is about whether the terms of this indenture take away those rights that are stated in the credit default swap agreement, which in unqualified terms in the credit default swap agreement state that the bankruptcy event of default permits the termination of the outstanding transactions under the credit default swap agreement.

There's been a little bit of misdirection here because throughout our summary judgment briefs we have made it plain

that there is no question but that these documents are to be read together. We do not say in any of our papers that the indenture is to be ignored. And the case law is clear they are to be read together.

Our point is that when read together it establishes -- the two documents establish that the indenture provisions on which Lehman relies were not intended by the drafters to vary section 6(a) of the credit default swap agreement or the specifically negotiated provision in the schedule to the credit default swap agreement which is section 1(i)(vii) which says that the bankruptcy event of default is applicable to LBSF. And there's lots of room in that specifically tailored schedule to say applicable with exceptions, applicable without exceptions. This was stated in a specifically negotiated document, the schedule, to be said that it was applicable without exceptions to LBSF.

So let's just make sure we understand what the issue is. The issue is that the indenture is not to be ignored. The issue is that the indenture is to be understood. And that's where we would like to go today. And Your Honor, we'd like to start, accordingly, with the credit default swap agreement itself.

And let's look at the first board, Your Honor, for the consequences of that bankruptcy event of default. Section 6(a) of the ISDA master, which as we know is part of the credit

default swap agreement, gives the nondefaulting party -- that is the Libra parties here -- the right to terminate. Now, what does it give the right to terminate? It gives the right to terminate at any time, that is, no cure period, no waiting period. And that right to terminate is defined as the right to designate an early termination date in respect of all outstanding transactions.

Let's also take a look at the October 10, 2008 notice of termination. That notice of termination, which is also on the board in the second half of the board there, Judge, exercises Libra's right under section 6(a). The language of this notice tracks -- in the callout -- tracked 6(a) and said that Libra was designating an early termination date in respect of, quote, "all outstanding transactions".

Now, what is the effect of designating an early termination date in respect of the outstanding transactions? Let's see what the contract says. What the contract says, Judge, is that the rest of the agreement remains in place once all of the outstanding transactions have been terminated. Section 6(c)(2), which is on the board in front of the Court, says that no further payments, quote, "in respect of the terminated transactions will be required to be made". That, Your Honor, is a reference to the fact that the exchanges of premium and protection payments obviously no longer have to be made on those transactions if the transactions have been

terminated.

But 6(c)(2) goes on to say, "But without prejudice to the other provisions of this agreement". Similarly, section 9(c) of the credit default swap agreement says that, quote, "The obligations of the parties under this agreement will survive the termination of any transactions."

And ISDA itself, as counsel noted earlier, has confirmed that the ISDA master does not have any mechanism for termination of the framework agreement but only for termination of the transactions. And ISDA has said, quote, "The ISDA master does not have any mechanism for termination of the ISDA master but only for termination of outstanding transactions."

Lehman has recognized this, Your Honor, in one of its briefs in -- not in this Libra proceeding but in the Lehman bankruptcy. In the Bank of New York proceeding, in Lehman's summary judgment brief, they acknowledged the distinction between the termination of the transactions and the termination of the framework agreement, and acknowledged there, Your Honor, that the framework agreement does not get terminated under section 6(a).

Now, is there a way for the agreement itself to be terminated? That, after all, is the word that appears in section 5.2(c) that counsel has put up on its visual aid and which we'll address in a bit. There is a way for the agreement itself to be terminated. It's black letter law that any

contract can be terminated on the mutual consent of the parties to that contract, unless, of course, there is another agreement that one of those parties has signed that limits the ability or the circumstances in which one of those parties can terminate that agreement.

And that's where the indenture comes in. That's what the indenture does. And as we'll see, Your Honor, the indenture itself sets forth very distinct and very separate definitions of the credit default swap agreement, which is the term specifically chosen in 5(2)(c) -- it's also specifically chosen in 7.8(a)(11) which Lehman relies upon -- versus the definition in the indenture of CDS agreement transactions. In short, Your Honor, the framework agreement does not disappear when there are no transactions outstanding. And that distinction is critical to an understanding of how to read 5.2(c) and 7.8(a)(11).

Let's take a look at those indentures, Your Honor. Let's take a look at the board in which we have put up the definitions of credit default swap agreement and CDS agreement transactions in full. And these definitions, Your Honor, we believe, are key to understanding how the drafters of the indenture intended the term credit default swap agreement in section 5.2(c) and in 7.8(a)(11), and for that matter, in 7.5(f) where it also appears and on which Lehman also relied, at least in their complaint, although they have not pursued it

in these summary judgment papers.

Credit default swap agreement in the indenture is defined to mean "The ISDA master agreement together with the schedule and the confirmations between the issuer" -- that's Libra -- "and the credit default swap counterparty" -- that's Lehman -- "under which the issuer, as seller, and the credit default swap counterparty, as buyer, shall from time to time enter into CDS agreement transactions."

And in like fashion, the definition of CDS agreement transactions means "The synthetic securities in the form of credit default swap transactions entered into by the issuer with the credit default swap counterparty under the credit default swap agreement."

Your Honor, the credit default swap agreement makes the same distinction between the agreement and the transactions in its own preamble. There's another fundamental element, Your Honor, that should inform the entire analysis here, and that is the ISDA master's entire agreement clause and its definition of this agreement, and the point here, Your Honor, is that we believe that this establishes that the indenture does not modify the subject matters of the credit default swap agreement, except as expressly stated in the credit default swap agreement. There are lots of references to the indenture in the schedule to the credit default swap agreement, and those are obviously incorporated into that agreement. But we

believe, Your Honor, that this definition of the entire agreement and the ISDA's definition of this agreement goes to show that the parties did not intend that any other contract was going to cover the subject matters of this credit default swap agreement unless the credit default swap agreement itself says so. The entire agreement clause says quote, "this agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communications and prior writings with respect thereto." Now, let's work our way up the top of this page, Your Honor. As the first page of the ISDA master agreement shows, the phrase, quote, "this agreement" means the ISDA master, the schedule, and the confirmations. The phrase "this agreement" is used in the entire agreement clause of section 1(c). It is used in 1(c), and that shows, Your Honor, that it means this master agreement and all confirmations. That is what this agreement means, and if you look at the top highlighted section of this page, Your Honor, you'll see that the master agreement includes the schedule. So put those together, and the phrase "this agreement" as used in 9(c) means the master agreement, the schedule, and the confirmations, and it says there are no other agreements that address the subject matters covered by this agreement.

Now, that entire agreement clause is very instructive. And the courts say that it needs to be paid attention to in

understanding that agreement and any other agreement that is entered into by the parties. The In re Demmert case, we believe, Judge, is particularly instructive here. And that came out of your sister court, the bankruptcy court in the Eastern District last year. In Demmert, the Court said that -- it involved a lease and a letter of intent; those are the two documents in question, and it was the lease that contained this merger clause. The Court said that, quote, "The purpose of a merger clause in the lease is to clarify that the defendants and the plaintiff can look to no other agreement with respect to their rights and obligations under the lease," close-quote. The Court enforced both contracts because it found that they addressed different subject matters, just as here, section 6(a) in the credit default swap agreement addresses termination of the transactions, and section 5.2(c) of the indenture addresses a termination of the entire agreement.

The Demmert Court went on to say that so long as the letter of intent is not being used to vary or modify the terms of the lease, the Court may determine the rights of the parties under the letter of intent which stands alone as a separate agreement.

Now, here, the termination of transactions is obviously one of the subject matters of the credit default swap agreement. Lehman's reading of the indenture of section 5.2(c) and 7.8(a)(11) is that it changes section 6.8, would put it in

conflict with the entire agreement clause. Basically, they're saying that it does cover what occurred here, which was a termination of the transactions. And as we've explained in our briefs, Your Honor, it does not cover termination of the transactions, which is the event that occurred here, but rather sections 5.2(c) and 7.8(a)(11) cover only this consensual termination of the entire agreement.

Now, the parties easily could have inserted, Judge, in this entire agreement clause in section 9(c) or -- I'm sorry, in the schedule to section 9(c) which is where amendments to the master agreement are done, could have said this agreement, together with the indenture, constitutes the entire agreement, but they did not do so. And it shows --

THE COURT: I'm confused by some of your references. I just want to make sure that I'm looking at the right thing and understanding your argument. You said 9(c). The entire agreement provision that I'm looking at is 9(a).

MR. WOLOWITZ: I'm sorry, 9(a), Your Honor.

THE COURT: Okay.

MR. WOLOWITZ: 9(a).

THE COURT: So we're on the same page, literally?

MR. WOLOWITZ: We're on the same page. I was not on the right subsection, but you were, Judge.

THE COURT: All right.

MR. WOLOWITZ: Now, the entire agreement clause aside,

let's consider the indenture because it does need to be understood. Because Lehman does not dispute the plain meaning of section 6(a) of the credit default swap agreement, it seems to us, Judge, that the burden is on Lehman to establish that the indenture withdraws those rights, the right to terminate the transactions, and affirmatively invalidates the termination of the transactions that occurred here.

Now, even though, according to Lehman, the indenture provisions they cite to fundamentally alter Libra's right, under the credit default swap agreement, to terminate the transactions, there's no explanation as to why those terms were not included in the credit default swap agreement's specifically-negotiated schedule. And again, the credit default swap agreement and the schedule is the only contract to which Lehman is a party. They've offered no explanation as to why these terms wouldn't be in there. And in fact, the schedule, far from altering Libra's right to terminate the transactions as a result of LBSF's bankruptcy event of default which stems from LBHI's bankruptcy filing, the schedule is specifically tailored to say, as I mentioned earlier, Judge, that the bankruptcy event of default was applicable to LBSF.

It also seems to us, Your Honor, that if the indenture provisions were intended to override section 6(a) of the ISDA or section 7.5(d) of the indenture that we'll get to, that says that Libra shall enforce all of its material rights under the

credit default swap agreement, that these indenture provisions --

THE COURT: Stop one second. You said section 6(a) of the ISDA. Did you mean section 6(a) or section 9(a)?

MR. WOLOWITZ: Section 6(a), Judge, of the ISDA which is the provision that gives Libra the right to terminate all transactions on account of the bankruptcy event of default.

THE COURT: Okay, let me ask you a question, because this is a well-prepared and well-organized motion for summary judgment argument on both sides. And it's very complicated. For purposes of the summary judgment argument, do you take the position that none of this is ambiguous and that there's no need for any review of the actual intent of the parties in entering into these multiple documents in a highly structured setting where parties well-represented are coming up with obviously antagonistic views as to how the document should be read?

MR. WOLOWITZ: Yes, Your Honor, we do take the position that these are unambiguous, and unambiguously in the Libra parties' favor, needless to say. Not surprisingly, there are lots of cases in which very complicated documents need to be parsed through, and that has been done, now. What is critical here are those distinct definitions of agreement and transactions in the indenture, and that's critical to understanding whether 5.2(c) of the indenture and 7.8(a)(11)

say what Lehman says they mean, or whether they're limited to a termination of the agreement which doesn't happen under the credit default swap agreement. It happens if there's a consensual agreement, obviously, between Lehman and Libra to tear up their agreement, which can't occur. And that's something we'll get into in a bit, Your Honor.

THE COURT: All right, go ahead.

MR. WOLOWITZ: Your Honor, the drafters of these documents did make it plain when they intended for one provision to apply notwithstanding another or one provision to be subject to another or one provision to apply only with exceptions. If the indenture provisions that the Lehman parties have cited to were intended to override section 6(a) of the ISDA master, and again, that's the one that gives Libra the right to terminate the outstanding transactions upon the bankruptcy event of default, then these indenture provisions would have said so. The drafters plainly knew, in dozens and dozens of cases, how to do that. Now, these provisions don't contain any of those types of subject to or except as provided in the language. Neither of the provisions cited by Libra in the -- by Lehman in the indenture, nor the provisions of the indenture cited by the Libra parties, section 7.5(d) and 12.1(b), and none of them references section 6(a). And that is because, given the structure of the way these documents were drafted, the drafters did not see them in conflict. The

indenture provisions that Lehman cites simply were not intended to address the situation covered by 6(a), which was a termination of all outstanding transactions as a result of the bankruptcy event of default.

Lehman's third party beneficiary status is a bit of a red herring, we would submit, Your Honor, because we don't dispute that they have a right to enforce provisions that were intended for their benefit. So the question is what do 5.2(c) and 7.8(a)(11) and the other provisions they cite mean? And this is where the separate definitions of agreement and transactions come in.

Let's take a look at those indenture provisions that refer to termination of the agreement. And it's not just 5.2(c) which Lehman put on their visual aide, Your Honor. It's also 7.8(a)(11) of the indenture. There's actually a third provision of the indenture that likewise refers only to termination of the agreement, and that's 7.5(f), but Lehman has not pursued 7.5(f) in their motion; they've not responded to our arguments regarding 7.5(f). It's probably because 7.5(f) only talks about replacement of the agreement after it was been terminated, and therefore, is not much help to Lehman on its motion, here.

So we've displayed section 5.2(c), but we've also displayed section 7.8(a)(11), Your Honor. Each of these refers to termination of the credit default swap agreement, and

neither refers to termination of the transactions, and you'll recall that those terms were separately defined and carefully defined in this very document, in the indenture. So what Lehman tries to do -- sorry, let me back up a moment. It's the October 10, 2008 termination notice that terminated the transactions. That's what it says. It tracked the language as we discussed earlier, Your Honor, of section 6(a), and it terminated the transactions, not the agreement, and therefore, 5.2(c), 7.8(a)(11) don't apply.

So what does Lehman try to do? In their papers, they try -- and by the way, we've made plain from the very first summary judgment brief, here, not just our reply brief, this distinction between agreement and transactions. So in their papers, Lehman tries to equate the agreement and the transactions, and they try to do so by sheer say so in their briefs. There's no textual support in the indenture to equate the two. And in fact, their attempt to equate the two underscores a fundamental problem with their case because we've seen the very separate and distinct definitions in this very agreement of transactions and agreement. In their papers, Lehman tries to avoid that difference by calling it a semantic distinction, as if that is somehow a pejorative. But we've seen in the cases that, actually, both sides have cited that the Courts are required to honor those semantic differences.

Now, in sections 5.2(c) and 7.8(a)(11), as we said,

Your Honor, the drafters chose termination of the credit default swap agreement, and those are separately defined in the indenture agreement and transactions. Now, that choice shows that these sections, 5.2(c) and 7.8(a)(11), were not intended to address a termination of the transactions under section 6(a), and that's consistent with the entire agreement clause, which we referred to earlier. These simply are not intended to address that situation and it's that situation, the termination of the transactions, which is the operative fact, here. That's what the October 10th notice, itself, says. Now, in fact, let's take a look at section 7.8(a)(11), which is one of the provisions cited by Lehman throughout its papers and in its complaint, because this underscores the distinction, Your Honor. 7.8(a)(11) prohibits termination of the credit default swap agreement unless there are no transactions remaining outstanding. Now, if, as Lehman contends, a termination of the credit default swap agreement is effectively the same as having no outstanding transactions, then this provision makes absolutely no sense. And again, the case law requires that provisions be made sense of where at all possible, and it's very possible here, particularly given the difference in the definitions of agreement and transactions. They are different things. Termination of the agreement, termination of the transactions, as 7.8(a)(11) itself confirms. And in fact, Your Honor, there are provisions in the credit default swap

agreement sections 6(d) and 6(e) of the ISDA master that apply only after termination of the transactions. Those govern calculations and termination payments. But we've also seen from the other provisions that we've cited that it's the entirety of the agreement that's stated in the credit default swap agreement that survives after termination of the transactions. So again, what does termination of the credit default swap agreement mean? These provisions apply to a termination of the framework agreement which can't happen under the agreement. So how can it happen? It can happen consensually. And that makes sense of these indenture provisions that restrict termination of the agreement because those provisions appear in the indenture because they restrict what Lehman and Libra can do together, possibly to the detriment of the noteholders and the other creditors under the indentures. And it makes sense that these provisions do not appear in the credit default swap agreement itself, the contract between Libra and Lehman, because they do not affect Libra's rights as against Lehman or vice versa. We're talking about a consensual tear-up of the agreement. And it has to be that because there is no mechanism in the agreement itself for the termination of the agreement. But we know black letter law permits consensual terminations unless there's another contract in which one of the parties undertakes some restrictions on the ability to terminate that agreement, and that's what these

provisions do.

Now, Lehman's second argument is that the transactions are the confirmations. But again, Lehman has no textual support for that argument, and in fact, they ignore the express definitions in the contracts which separately define the confirmations and the transactions. Your Honor, this visual aid is simply the first page of one of the two confirmations that we have here. The confirmations are actually a few pages long because they contain the terms, the common terms, governing the more than a hundred transactions that were in place here, and it's those more than a hundred transactions that were terminated in this case. The confirmations define, quote, "confirmation" and quote, "transaction" separately, and state that the confirmation is a letter that quote, "confirms the terms and conditions of credit derivative transactions entered into between us on the trade date specified below" -- that's when the transaction first began -- "and to be entered into from time to time in the future each a 'transaction' in respect of each reference obligation." So clearly, separately defined, and Lehman's effort to try to equate transactions with the confirmations cannot stand.

In fact, let's take a look, Your Honor, if we might, at the transactions themselves. We have a visual aid, here, that cannot be read from the bench, because in trying to put multiple pages of what is Annex A onto one board, the

individual trades can't be read from the bench. They're even tough to read on the eight-and-a-half by eleven.

THE COURT: They can't be read on this page, either.

MR. WOLOWITZ: And that's the other reason, Your Honor, why we gave you the notebook where that is Tab -- it's Annex A to one of the confirmations in the notebook. The only point, Your Honor, here is there are more than a hundred of these. There are more than a hundred transactions and only two confirmations. Each of these transactions has the specific economic terms of those transactions, and it is these that were terminated.

Now, Lehman, recognizing that the definitions in the contracts render it unable to equate the agreement with the transactions or the confirmations with the transactions, tried to slip into their reply brief and again, here, today, some parol evidence. And that is this October 31st letter from a trustee. They mention it for the first time in their reply brief. They put it in their visual aids, today, they put it in a notebook to Your Honor, and that is improper because it is inadmissible parol evidence on their case, as on ours. These two documents are unambiguous and parol evidence is not admissible for purposes of interpreting the provisions or interpreting what occurred here.

Moreover, Your Honor, that letter, the one that counsel referred to as the Halloween letter, cannot be

considered without context, without understanding what the trustee intended by those comments, it cannot be considered without first a finding of ambiguity of the indenture and the credit default swap agreement when read together, and it cannot be considered without a consideration of other parol evidence. For example, Your Honor, we are confident that communications between Lehman and the ratings agencies would confirm that it was important to the ratings agencies in giving these notes a triple-A rating, that this bankruptcy event of default would be enforced, and that it would be enforced upon the bankruptcy and that the outstanding transactions would be terminated on that bankruptcy.

We're also confident, Judge, that communications between Lehman Brothers and the investors would likewise confirm our reading of these documents. But because both sides have briefed in the case that the documents are unambiguous, we have not put in that parol evidence before the Court or in a visual aid. Our point here, Judge, is that that Halloween letter cannot be considered without consideration of all parol evidence and without a finding of ambiguity.

Your Honor, in short, the plain distinction on the face of the contracts between the agreement and the transactions must be honored in interpreting the sections of the indenture that they cite to. Now, the reason we have cited section 7.5(d) of the indenture and 12.1(b) of the indenture,

Judge, is just as an additional reason to explain to the Court why Lehman's reading of their indenture provisions cannot be the case. Because if their reading of those indenture provisions were to be the case, if they were to apply to termination of transactions in order to prohibit termination of the transactions, notwithstanding Lehman's default and notwithstanding section 6(a) of the credit default swap agreement, then their reading would be in conflict with two other provisions of the indenture. That is the reason why we brought to the Court's attention section 7.5(d) of the indenture and section 12.1(b) of the indenture, which we do not have visual aids of but which are fully briefed in the papers and are contained in the notebooks before the Court.

Now, Lehman's own -- what you're going to hear, perhaps, because it was in their papers, is that, well, this conflict posed by their reading of sections 5.2(c) and 7.8(a)(11) might not arise, in fact, because it's possible that the swap counterparty might have tried to assign before the termination, it's possible that they might have succeeded in an assignment before termination -- speculation. It's possible that the noteholders may vote for liquidation; we shall see. But the problem with Lehman's reading is that contracts, as we know, have to be interpreted so as to give all terms meaning, and Lehman's reading of its indenture provisions does not do so in an obvious potential scenario. For example, with respect to

section 12.1(b) which says that defaulted securities -- and Your Honor, in our -- in one of our briefs, we went through all the definitions that have to be, sort of, gone through one by one to understand why these transactions that were terminated or defaulted securities, suffice it to say for purposes of today, that's on page 15, footnote 13 of Libra parties' memorandum of law and opposition to their motion for summary judgment. The point here, Judge, is that 12.1(b) would require the disposal of securities that are -- like these transactions that are defaulted. And therefore, Lehman's reading of section 5.2(c) that it would prohibit the termination of transactions would be in conflict with 12.1(b). Our point, here, is that that is an additional reason, besides the text of the definitions and the choice of words of 5.2(c) why Lehman's reading of 5.2(c) and 7.8(a)(11) cannot stand. The same is true with respect to 7.5(d) of the indenture, Your Honor. We point to it simply to point out an additional reason why Lehman's reading of its indenture provisions cannot be accurate.

Now, again, it's important to recognize that on the plain text reading advanced by the Libra parties, based on the definitions set forth in the indenture, based on the definitions set forth in the credit default swap agreement, based on the deliberate choice by the drafters in sections 5.2(c) and 7.8(a)(11) of the term "credit default swap

agreement", there's no need for these various sections to cross-reference each other because the drafters did not consider them in conflict. On Lehman's reading, one would have to include that the drafters simply forgot to include one of the "subject to"s or "except as provided in"s which they were otherwise so careful to include throughout the document in dozens and dozens of cases. We agree that the contract should be read together. The indenture should be read together with the entire agreement clause which reinforces the conclusion that the indenture does not address the subject matters of the credit default swap agreement except where the credit default swap agreement says so. And it didn't say that the indenture shall affect the termination of transactions section.

The indenture sections addressing termination of the credit default swap agreement must also be read together with sections of the credit default swap agreement which show that termination of the transactions is not the same as termination of the agreement, for example, that section 6(c)(2) that we pointed to earlier which says that provisions of the agreement shall survive.

Your Honor, in our papers, we also pointed out why this textual reading makes sense. Why it makes sense of the temporal limitation of 5.2(c) between acceleration and liquidation. But that is, again, a tertiary point to point out why this textual reading of those indenture provisions makes

sense. In our view, Your Honor, reliance upon the text alone is sufficient. But it happens also to make good sense and commercial sense of the temporal limitation.

Your Honor, they also rely upon section 5.5(a) of the indenture, which perhaps they're saving for rebuttal, today, but which they did not address in their opening remarks, but which they do cover in their briefs and which they do mention in their complaint. Now again, Your Honor, this language is not ambiguous. It states that after an indenture event of default, that is, after an event of default under the indenture, here, quote, "the trustees shall retain the collateral, securing the notes intact in accordance with the priority of payments and the provisions of a number of sections, including section 12, unless either subsection 1 or subsection 2 under 5.5(a) occurs. Now, Your Honor, we did not display subsections 1 or 2 of 5.5(a) on the visual aid, A, because they're lengthy, and B, because there's no dispute that they didn't occur. Section 5.5(a) says that the trustee shall retain the collateral in accordance with section 12 unless one of those two things occurred. They didn't occur, both parties agree they didn't occur, and therefore, section 12 must be complied with. And as I alluded to a moment ago, section 12 requires termination of defaulted securities including the transactions, here. Now, we had set forth as early as the brief that I mentioned, Judge, the fact that the transactions,

here, were defaulted securities, and in none of their briefs did Lehman address that. They tried to address it in their remarks, here, today, Judge, but we don't think that attempt fails. In any event, we think the definitions are clear in the footnote that I cited to.

But again, the point as to 5.5(a) is that it says --

THE COURT: I'd like to hear more about that. I mean, Mr. Miller takes the position that there can't be defaulted securities because the bankruptcy intervened, and the definition has resulted inoperative. What's your position with respect to that?

MR. WOLOWITZ: I think what we're dealing with, here, Your Honor, is that that is a bit of a red herring because the question is what was intended by these provisions. And what was intended by these provisions is that section 12 was intended to apply unless two situations arose. So the point is not whether or not section 12 might have become inoperative. The point, Your Honor, is that section 12, which required disposal of defaulted securities, which is what these were, was required by section 5.5(a) to be complied with. Our point is that section 5.5(a) simply was not intended to cover the situation here where there are securities that were defaulted. Whether something intervened that prevented that from coming into being is nothing that they had briefed before today, and I think, Your Honor, we would like a chance to respond to that

point if Your Honor deems that to be relevant.

THE COURT: I was just reacting to what you had just said, which played on the definition of defaulted securities and it's not clear to me that there are defaulted securities within the meaning of the indenture by virtue of the bankruptcy of LBSF. But if you don't consider it important to your argument, move on. It's fine.

MR. WOLOWITZ: Counsel also addressed, Judge, the Rabobank case. Rabobank says that section 5.5(a) is not applicable when you have section 12 defaulted securities. I do think, Your Honor, it is important to the argument that these be considered defaulted securities. We briefed it; it was not responded to by Lehman in their briefs. We've not yet had a chance to consider, fully, the arguments they've raised today as to why they're not defaulted securities. We would like the opportunity to brief that question. Not having had the opportunity before now, Lehman having had the opportunity to address our showing that they are defaulted securities, and not having availed themselves of that opportunity.

THE COURT: It's fine with me. If you'd like to submit a brief supplemental briefing on that limited question.

MR. WOLOWITZ: Thank you, Judge. In Rabobank, the hedge agreement gave the counterparty the right to terminate upon liquidation of any or all of the collateral. In Rabobank, the Court held that when you have defaulted securities, the

provisions of section 5.5 do not apply because section 5.5 applies to a liquidation of collateral. Section 12 refers to the disposition of defaulted securities, and when you have defaulted securities, section 5.5(a) does not apply. That's what occurred in Rabobank. What did not occur in Rabobank is what counsel for the creditors' committee alluded to during the committee's remarks. The Court in Rabobank did not import from the indenture some term into the hedge agreement there that was not already in the hedge agreement. In Rabobank, the hedge agreement referred to the termination event as an event of default under the indenture. So there was no importation, in Rabobank, of some term from the indenture into the hedge agreement. But Rabobank did hold that section 12 sales dispositions are not liquidations as that term is used in section 5.5(a). So 5.5(a) does not apply where, as here, you have defaulted securities.

Your Honor, just very briefly on the automatic stay issue that Lehman raised in its complaint but which it did not pursue in its briefing. It's undisputed that Libra is a swap participant within the meaning of Section 560. It's undisputed that the transactions, themselves, are swap agreements within the meaning of Section 560. It's undisputed that bankruptcy is a condition of the kind specified in section 3.65(e)(1). We've briefed these points and Lehman has not responded to them in their briefs. The committee says two things. The committee

says that termination must be fairly contemporaneous with the bankruptcy filing, and they cite to Enron. Your Honor, there's no case, and the committee does not cite to one, holding that the safe harbor expires in twenty-five days, which is what occurred here. We had the LBHI bankruptcy filing, as we all know too well, on September 15th. The termination notice was October 10th, a mere twenty-five days later. The Enron termination, as I'm sure Your Honor knows, was more than a year after the bankruptcy and was after the debtor rejected the contract. This was the Court's response to an unusual attempt to game the system.

In fact, the committee's argument contradicts Lehman's argument that the indenture supposedly gave room for Lehman to try to do something about its bankruptcy default before termination. There's no textual support for Lehman's position in either of the contracts. There's no cure period in section 6(a) of the ISDA master agreement, the assignment provision itself that is in the schedule gives no indication that it's there to permit a cure of a bankruptcy event of default. But Lehman would say that twenty-five days is too soon, the committee says it's too late, and there's no either statutory or textual support for either position, Judge. And we would submit that there's been no case holding that twenty-five days is too late.

Now, they also make a reference -- the committee

does -- in their papers -- on the automatic stay point, Your Honor, in the application of Section 560 -- to the fact that the October 10, 2008 notice terminating the transactions also refers to the payment default by Lehman. But there's no dispute that that notice, at a minimum says that the termination was, quote, "an event of default has occurred pursuant to Section 5(a)(7) of the Agreement" -- that's the bankruptcy event of default section -- "as a result of the filing of the Credit Support Provider" -- that's LBHI -- "of a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code." Thus, on the very face of the notice, the operative document, here, the October 10, 2008 notice, Libra, in the words of Section 560, quote, "exercised a contractual right to cause the termination of one or more swaps because of a condition of the sort specified in Section 3.65(e)(1)." Even if there was also an attempt to exercise some nonprotected right, and we aren't suggesting that there was, at most, that nonprotected attempt would be invalidated. But that's a straw man, because Libra has not contended, here, that a termination based upon LBSF's nonpayment would be protected under the Bankruptcy Code. And Section 560 is plain; the exercise of a contractual right such as 5(a)(7) of the ISDA master, the bankruptcy event of default, and referenced in the October 10th notice, quote, "shall not be stayed, avoided, or otherwise limited".

In summary, Your Honor, the Libra parties request that their motion for summary judgment be granted in its entirety, that the termination of the outstanding transactions be held valid, and that there be a declaration that the automatic stay was not violated, and that Lehman's motion for summary judgment be denied. Thank you, Judge.

THE COURT: Thank you. Mr. Miller, do you have anything you wish to say in response?

MR. MILLER: May it please the Court, Ralph Miller. Yes --

MR. WOLOWITZ: Oh, I'm sorry, Judge. I'm sorry. I apologize. There was one more thing I wanted to add.

In terms of these judicial admissions --

THE COURT: Just so the record's clear, counsel for Libra is now speaking, even though I just asked Mr. Miller if he had anything to say. I didn't want the record to be in anyway confused.

MR. WOLOWITZ: Steve Wolowitz, again, for the Libra parties. In terms of the judicial admissions, so-called, that counsel referred to earlier, firstly, the point that we had made about transactions versus agreement were made in the earliest of our summary judgment briefs, and this was not an argument made in any of their briefs in this case: not in their reply brief, not in their opposition brief. They're raising it for the first time in this oral argument, today.

They can't say that they're doing so strictly because we raised it in our reply brief because that is not accurate.

Your Honor, at most, that's an admission, if it's an admission at all, that the agreement was terminated. And I don't think Lehman wants to agree to that admission. I think what they're trying to suggest is that it is parol evidence as to what the drafters of these documents intended when they wrote 5.2(c). It really misses the most important point, here, which is that 5.2(c) is not applicable because the indenture separately defines agreement and transactions. It really doesn't matter what I wrote or what my colleagues wrote when we drafted our pleadings. It's parol evidence at most, and Your Honor, we would suggest that it's of dubious probative value, even if parol evidence were to be admitted in this case. It cannot override the carefully drawn definitions distinguishing agreement and transaction set forth by the drafters of these documents, which is what is relevant, here.

THE COURT: But whatever the relevance, I think the argument being made, however, is that statements made in pleadings filed constitute judicial admissions. Admissions of what becomes a question that I'm going to have to wrestle with.

MR. WOLOWITZ: And even if they are admissions of what is one of the relevant questions, but even admissions are parol evidence if they are documents outside -- parol evidence often consists of admissions. What did a party say in a letter --

THE COURT: I believe that --

MR. WOLOWITZ: -- does not change it from parol evidence.

THE COURT: Maybe we're confusing parol evidence with what I consider to be evidence that properly is part of the record to be considered by the Court in considering the motion for summary judgment, and I consider the pleadings of record in the docket of the now-consolidated adversary proceedings to be matters that I can consider in deciding motions for summary judgment, and they do constitute part of the record. I think that to describe it as parol evidence is to diminish the possible impact of such admissions. And all I was really doing is clarifying that what Lehman was saying -- and you can challenge it, if you wish, of course -- is that statements in pleadings constitute judicial admissions. You're saying, at most this is parol evidence not to be considered. I'm telling you that my reaction to that argument is it's part of the record and I'm going to consider it.

MR. WOLOWITZ: Judge, may we brief that issue, as well, as to the fact that it is part of the record does not mean that it is not parol evidence in interpreting the way the drafters of these documents intended those provisions to read?

THE COURT: Well, the question is whether or not you've made -- and I'm not suggesting it's even that important a point -- the question from Lehman's perspective, I think, is

that I should take into account how this matter has been addressed in pleadings.

MR. WOLOWITZ: Well --

THE COURT: You are both saying with tremendous amount of emphasis that these documents are unambiguous and that parol evidence is something I need not consider. Following, now, an argument that's been going on for almost two hours with respect to documents that are supposed to be clear, there's almost a res ipsa loquitur factor here. If it requires this much demonstrative help and this much skilled advocacy to demonstrate how plain the meaning is, and you reach diametrically opposed results, one can question how plain the meaning really is. You don't need to respond to that rhetorical remark.

MR. WOLOWITZ: Understood, Judge. Not to respond to that, but simply to respond to the judicial admissions point. I think we've got, perhaps, competing judicial admissions, because as I mentioned, in the Bank of New York case, Lehman admits that the termination of the transactions, as understood by these documents does not constitute a termination of the agreement. And that is in paragraphs 36, I think it might also be 51 of their motion for summary judgment in the Bank of New York case.

THE COURT: Okay. Mr. Miller, it's your turn if you wish to add anything.

MR. MILLER: Yes, Your Honor. Ralph Miller, again. I did have some things, and I have a number of notes. One question is, since we have been going two hours, is there any desire in taking a short break which might actually shorten the time I need, or does the Court want me to go ahead? I can --

THE COURT: That's a very welcome suggestion. Why don't we take a ten-minute break.

(Recess from 4:16 p.m. until 4:31 p.m.)

THE COURT: Be seated, please.

MR. MILLER: Your Honor, Ralph Miller for the movants LBHI and LBSF.

I want to cover three things briefly, Your Honor. First, I want to try to clarify some confusion about the question of ambiguity and parol evidence and what is the summary judgment record and the position of LBSF and LBHI on the relation between the ISDA master of the confirmations, the transaction and the question of credit default swap agreement in section 5.2(c).

First of all, as the Court knows, when you're dealing with a breach of contract case you have basically three parts of a summary judgment record. You have the documents themselves; you have evidence of the circumstances and context in which those documents were executed initially and then you have the course of conduct, what happened to breach, basically, under the history after those documents were entered into. The

history of what happened under the documents is not parol evidence trying to change the documents it's who did what.

In this case there's no disagreement about what the text of the documents is. There is disagreement, and there's almost always disagreement, on how the context should be viewed, who was thinking what when the contract was entered into. That doesn't make them ambiguous that just means that the people are trying to create different things. However, the operative facts are that these were solemnly entered into and all the parties are bound by these complex terms.

Now, the ISDA agreement is a very small document, even with its attachments, compared to the indenture which is hundreds and hundreds of pages. So there's clearly a lot of terms in the indenture that are not in the ISDA master. The whole purpose is that they have to be put together. And because this is an SPV transaction, all of the SPV part occurs in the indenture, not in the ISDA master. The ISDA master could be a simple interest rate swap between two parties.

Our position, Your Honor, is not that there is an identity between the agreement and the transactions. Clearly there are all sorts of revisions in the indenture that deal with individual transactions, a specific transaction in going to default and have to be terminated. Transactions can be bought, sold; things can happen to individual transactions.

The facts of what happened here has to do with a

specific mechanism for an event of default followed by an early termination date and that was declared to be October 10. And the question is, what did that event mean when you put it against the body of the background documents? And the October 31 statement of what it meant is not parol evidence about what the contract meant, it was a statement of fact, undisputed by one of the parties, it's an admission, not a judicial admission but it's an admission of what they did on October 10. They said the trustee instructed them, the issuer, to terminate the credit default swap agreement, not the transactions there under only but the credit default swap agreement. And they said they gave a notice of the termination of the credit default swap agreement which is called notice of an early termination date.

A couple of important points that are in the record and clear. There's what's called a reinvestment period. The reinvestment period is the period in which new transactions can be put under a swap agreement. The reinvestment period ended with the acceleration, it's in the documents here. It states the reinvestment period has ended. That means that this particular ISDA master and the things associated with it could take no new transactions.

There are times when the ISDA master still exists and can take new transactions. In that instance it may be important to try to cut off the right to put under new transactions. That explains, for example, one of the reasons

for 7.8(a)(11), if the transactions under an ISDA have run out and the party wants to terminate so no new transaction will come in and the reinvestment period has not ended, there may be a window there where it's still alive, it's still an active contract.

In this instance the reinvestment period had already ended. All that was left was to play out the outstanding transactions. And as Mr. Firth says and as the October 31st letter said, the designation of an early termination date closes out the agreement, it ends the credit default swap agreement. We believe that that furthermore is admitted in their answer in the summary judgment record. Their answer said, on October 31st -- I'm sorry; start over. On October 10th the early termination date notice was given thereby terminating the credit default swap agreement. So that's an admission of what happened on that date. It's not a question of what the documents mean. It's not parol evidence. It's a statement of what they did and that admission is binding on them.

So your summary judgment record is clear, that they did what section 5.2(c) said they could not do. And that means that what they did was barred by section 5.2(c). And getting lost in the question of whether the ISDA master continued to have any meaning, certainly it did. And whether individual transactions could have been terminated, certainly they could

have. None of that has to do with an event of default and an early terminations date and this record which says that that early termination date thereby terminated the credit default swap agreement. So this whole effort to say we didn't really do what it said, I think is contradicted by the record.

I also have a case; I mentioned this before Your Honor, that I think is helpful. If I might approach? And this --

THE COURT: Yes, you may hand that up.

MR. MILLER: Pardon me?

THE COURT: Yes, you may hand that up.

MR. MILLER: Thank you. I will, Your Honor. Actually, Ms. Collins is going to hand it up. And this is a little bit different context but I think it stands for a proposition that is clear in the law. This is a bankruptcy case having to do with a car company that had a financing master contract and an effort -- that contract was one where individual financing transactions were presented to the finance company and the finance companies terminated the contract and it became clear they did it because of the bankruptcy of the car company. And the Court there concluded that the stay applied to it.

But near the end of this there's an argument by the car company. So they said look, it doesn't matter whether we terminate the contract or just say we're not going to have any

new transactions under this contract, it's the same thing. So they say you can't keep us from terminating the transactions even though the stay says we can't terminate the contract, that is terminating the taking of transactions.

And what the Court says, on page 10 here, is it says near the end, it says, "However the bankruptcy of Ernie Harry Ford cannot be the reason for rejecting every consumer contract without regard to the merits of the individual transaction with a result of effectively terminating the contract purchase agreement in violation of the automatic stay."

The point here is what is being argued here is that there is a way around this provision, through an effective termination that is called something else. Whether that might or might not be done, if someone sent a notice of termination that said we hereby expressly say that the ISDA master remains in place and the credit default swap is still in place, however we terminate only the outstanding transactions, we don't have those facts. The facts are that the October 31st letter says that they sent a notice of termination of the credit default swap agreement and their answer and their complaint say they terminated the credit default swap agreement.

Now, later in the briefing, which doesn't put any facts in the record, they say no that really isn't how you should think of that. You should read the letter to be something different. But they can't redefine the letter from

what it was defined as contemporaneously and what they admitted it was. It was the termination of the credit default swap agreement. And I think that clears out most of the issues and frankly, because they've admitted, as they say, that was the sole issue under 5.2(c); you have a summary judgment record that requires a summary judgment of 5.2(c). It is true, we have not pressed summary judgment on some other issues, because we think there might be fact issues we don't think they're necessary.

There's a little confusion about 5.5. 5.5 was never an independent basis. 5.5 is the provision that says what's necessary to liquidate and our position was and is, and it's not admitted, that two-thirds vote was necessary under 5.5(a) for liquidation to begin. And if you go to the October 31st notice it explains to the noteholders that they are asking for the vote under 5.5(a) and that's the function that we used for it, they've acted like it was an independent argument. There's the language, reading briefly through lines, this is -- you can't see that because it's not the blowout, it's below it right down there. It says, "Pursuant to Section 5.5(a)(2) of the Indenture, sixty-six two-thirds percent of the controlling class and sixty-six two-thirds percent of the other classes of notes voting as a single class may direct the trustee to liquidate the collateral under the indenture." And then it's got a voting form on the right. It says here's how to vote.

That was the discussion of 5.5.

The record now reflects that vote never came in and liquidation never began. So one of the conditions of 5.2(c) that was necessary never happened so 5.2(c) was not satisfied at the time of the termination and in fact is not satisfied today.

We believe that there is a clear summary judgment record that 5.2(c) was in effect, it's unambiguous, that provision alone, what they did or purported to do on October 10 violated it and therefore that termination notice, that effort is invalid. Whether they could have done it differently later doesn't really matter too much because the automatic stay came up and they can't do it now unless they do it in some way that gets them through the stay.

Now, I do want to mention how Section 560 impacts this. The notice of termination of October 10 also cited a payment default. It said, you're also being terminated for a payment default. We invoked Section 560 because the payment default is not under the automatic -- under the safe harbor. Section 560, and we actually, conveniently, have given the Court a case which I'm sure the Court is familiar with, in the Enron case, the same case, the Marta (ph.) case that we cited, there's a discussion of the fact that Section 560 is only limited to ipso facto clauses. And so -- and this is tab 11, I'm sorry; tab 12. And it's the page that has the little

yellow flag on it but it's the lower right-hand corner. And it says, "Section 560 to Bankruptcy Code provides an exception to the non-enforceability of ipso facto clauses in connection with swap agreements in a bankruptcy case." And then it goes on and it says, "It preserves the right of a non-defaulting counterparty to terminate the contract based upon, among other things, the filing of a bankruptcy petition." That's true. Then it goes on and it says, "It does not provide an unqualified right to terminate a swap agreement." And it concludes and it says, "The right to exercise termination rights does not arise from all types of defaults but only from defaults first triggered because of one of the otherwise proscribed ipso facto provisions."

So trying to terminate it because of the credit rating or trying to terminate it because of the payment default, that's the same problem as a lease that is in arrears and somebody goes into Chapter 11 protection and they won't assume and assign the lease and they're going to have to make up the rent and the whole assumption and assignment mechanism is set to take care of that. And one of the things that will happen, if there is an assumption and assignment by Deutsche Bank, as LBSF believes should happen, is that'll all be sorted out, the premium payments will be made and brought up to date, adequate assurance of future performance will have to be provided and we'll deal with that issue. So this whole 560 digression, we

think, is a confusion about where it was fitting in, it does fit in. And it does take care of 12.1.

The other point is, they really do argue in their brief that there's an independent basis for termination under 12.1(b). And let's put -- actually we don't have 12.1(b) to put up. We do have it here, tab 15. This is -- I'm sorry; this is tab 16. They suggest they want some briefing on this but let me suggest to Your Honor we don't need any more briefing because they've had a chance to do this and they said they were basing it on a payment default.

This does not say that the issuer will sell, terminate or otherwise liquidate any defaulted security. That's what Mr. Wolowitz said a couple times. That's not what it says. It goes on and it says, within one year after the related collateral debt security became a defaulted security. In other words, it says if you got a defaulted security then you got a year after it becomes a defaulted security -- I'm sorry. If you got a defaulted security and the related collateral debt security becomes a defaulted security, then there's a one-year period to get rid of the defaulted security.

It's a little confusing but what that means in the definitions and they're covered a little bit here and we can go into them in more depth if necessary, in our tab 18, is the synthetic security which is the transactions that are the swaps here based on mortgages. The synthetic securities are the

collateral debt security. If premium is not paid on them, then they become a defaulted security and a year later that requires the sale of the credit default swap agreement that's hooked up to those synthetic securities.

There's no showing in the summary judgment record from the labor parties that there's any way to meet this second requirement of 12(b)(i) other than this October 3rd notice, the same day as the bankruptcy filing, which would have meant, if there had not been a bankruptcy filing, three business days later, Tuesday or Wednesday of the following week could have caused the collateral debt securities, that is the synthetic securities, to become defaulted securities and then the one-year period would have started.

The point is, the one-year period had never started. There's no independent route through here and so 12.1 doesn't help. 12.1 does not shed any light on how 5.2 should be interpreted.

There's another important point here about the way the ISDA master works, and I don't know if we have our blowup of the ISDA master but it was passed out. The ISDA master has a lot of so-called switches that can be applied to it, where you can say something applies or doesn't apply. 6(a) has an automatic and a non-automatic option. The automatic early termination can be specified in the schedule. If there's an automatic early termination then if one of these conditions

occurs, which includes the bankruptcy conditions; it kicks in without any notice. There's no election. That was not selected. The record is clear that this is not an automatic termination notice, that is we need no termination notice.

This was an optional, if you will, termination, the may clause. That allows, in the SPV deals, the indenture to control and regulate when those rights are exercised. They may be done, they're not automatics. And under certain periods, and remember 5.2(c) only operates under this sort of narrow but important situation where basically the deal is in financial trouble, the notes are in the process of being accelerated. Liquidation may be imminent if this two-thirds vote comes in. The deal is crashing, the plane is hitting toward the ground. The question is at that point, who's entitled to have people put on their parachutes and jump out, in effect, or are we going to ride it down and try to fly through the storm. And this is a disaster situation and this may clause in 6.1(a) allows the much more complicated indenture, which is dealing with the complexity of the SPV structure to activate, turn on and turn off and that's what happened in Rabobank, basically, was the Court was saying, and there was not a bankruptcy in Rabobank by the way, but the Court was saying the early termination date was not going to be activated because some of the requirements of the indenture were not met. So we think, again, the record is clear on the way these -- on the way the

facts interact with the provisions here.

Let me pick up a couple of more points of confusion, see if I can clarify them very quickly. The -- one of the arguments is whether the ISDA is something where the terms are being buried in the ISDA. As I think I've said, Your Honor, we don't make any argument that the terms of the ISDA are being buried. We simply say that the right to exercise certain things under the ISDA is allowed or not allowed under the indenture. I think I've already talked about 5.5 and 12, section 12. I've mentioned that we don't believe -- we're not seeking a summary judgment under 7.8, we do have it in the case still.

And I now want to talk a little bit about where we are structurally in terms of this overall transaction and what needs to happen to make sense out of it. As the Court will recall from the hearing on the approval of the letter agreement with Deutsche Bank, this is a transaction with great value but with perishability. And in order to preserve the value for the estate, it's important that an assumption and assignment occur because the senior swap agreement here has a provision which says, and we don't agree that it's enforceable, but it purports to say the senior swap doesn't make termination payments. It does have to make payments that are periodic if the transaction continues. So the value of this transaction is to let it continue.

As a reality matter, Your Honor, a delay in getting a resolution in this case risks the de facto termination of the transaction and therefore would allow Societe Generale to escape from its obligations and its debt. Because the Deutsche Bank commitment expires in early October it may or may not be extendable but frankly market conditions have shifted quite a bit since that commitment originally came in and we don't know where it stands. So if the Court decided to have delay briefing and discovery, which I know is an issue that was raised, the practical consequence here is that that may be about the same as a ruling for the labor parties because, as a practical matter, if this can't be put back together in time it's going to die and slip away. And so as far as the estate is concerned, we believe we've done everything we possibly can and we believe that the summary judgment record is clear. We think that judicial admissions take care of some of these new factual contentions that are being raised. We don't believe there's any need for further briefing. Obviously if the Court said that if they want to submit some briefs they can and we may or may not need to respond but we certainly do not encourage the Court to go into an extended schedule in part because of the commercial realities that are involved here.

And again, all we're asking Societe Generale to do and the labor parties is to stay the course, let the deal live and follow the documents.

And with that, Your Honor, I would take any questions from the Court and then I believe the committee counsel, Mr. Winston, has a few brief remarks.

THE COURT: Okay. Just in terms of timing, I'm pretty much at my limit of being able to hear more about this case. I know it's very interesting but it's something that requires me to spend some time with the documents. And so hearing you speak to these issues carries with it a point of diminishing returns. With that, I'll hear from the committee briefly.

MR. WINSTON: Your Honor, I guess I would say thank you for letting me talk. Eric Winston --

THE COURT: No, you can talk as much as you want. You have five minutes or less.

MR. WINSTON: Eric Winston of Quinn Emanuel on behalf of the creditors' committee. I am going to respond to one point raised by counsel for Libra and that goes to the understand of the Rabobank case.

Towards the end of his presentation he made the statement that what didn't occur in Rabobank was the importation of definitions from the indenture in that case into the hedge agreement. I think there's two paragraphs that I'd like to read from the Rabobank decision that completely dispose of that argument.

There's a very nice discussion at page 10 of the Westlaw site that summarizes the arguments. But starting at

page 11 the Court states, "Rabobank argues that a liquidation in fact occurred with the sale of collateral in August 2008. To make this argument it essentially ignores section 5.5(a) of the term supplement and points to section 5(e)(ii)(1) of the schedule to the hedge agreement. That latter provision explains that an 'additional termination event' permitting termination of the hedge agreement exists on the occurrence of an 'event of default' under the indenture followed by the acceleration of the notes and the liquidation of any or all of the collateral." And it's that language that I think counsel was referring to.

The Court continues, "Rabobank argues that a sale of assets pursuant to Section 12.1 of the term supplement constitutes a liquidation under Section 5(e)(ii)(1) of the schedule." And this is where I think the Court disposes of his argument, "The parties agree that the hedge agreement and indenture were executed as part of a single transaction and should be read together. Reading these two provisions in the term supplement and the scheduled together, therefore to give full meaning to both provisions the term liquidation in the schedule should be understood to incorporate the definition given to that term in section 5(a) of the term supplement of the indenture and to require that each of the three predicate events for liquidation occurs before this additional termination event exists."

The Court made it one hundred percent clear what it was doing. It was taking a term and that indenture and incorporating it into that hedge agreement.

Thank you, Your Honor.

THE COURT: Okay. Thank you.

MR. WOLOWITZ: Your Honor, let me maybe start with the last first, just in terms of Rabobank. "Rabobank's right to terminate the hedge agreement is contractually defined and includes the right to terminate in the event of a defined default under the indenture." That's the way the termination event in the hedge agreement in Rabobank was defined. It was defined in terms of events occurring under the indenture. Nothing was imported.

Your Honor, with respect to the October 10, 2008 notice, the operative document here, the notice itself said in accordance with section 6(a) of the agreement. We hereby designate October 10, 2008 as the early termination date in respect of all outstanding transactions. That's the document. It's undisputed. They've admitted that's the document. That's in their response to our statement of material undisputed facts.

With respect to Section 560, that same document says, "We have determined that an event of default has occurred pursuant to Section 5(a)(7) of the agreement," that's the bankruptcy event of default, "As a result of the filing by the

credit support provider of a voluntary petition for relief under Chapter 11 of Title 11," etcetera. That's what the operative document says in both of those respects, Your Honor.

Your Honor, if there is a finding of ambiguity, and I have no idea whether Your Honor's going to go there or not, contrary to what both parties have urged we would request that, as indicated in the scheduling order that was discussed with the Court, that we be permitted to take discovery. If parol evidence is going to be admitted by either side, we believe that the Court needs an entire record.

Now with respect to the Deutsche Bank agreement and its ostensible deadlines, we do not believe that that deadline ought to control the proper administration of justice of this case. And it may be the case that they are willing to extend, as they did once before, considering that they are not going out of pocket a nickel, we would hope that they would do so again if that's the way the Court goes. We would just like to put that request on the record.

THE COURT: Okay. We're not going to talk about the extension with Deutsche Bank now because it's not before me. I'm going to assume, for the sake of where we are at the moment, that the October 2 deadline, I believe it is, remains the effective deadline for the transaction. But Mr. Miller did raise an important issue, which is that the passage of time could be the death knell for a transaction which has been

creatively restructured on the debtors' part and which could produce significant value to the estate.

So a question for you, since you had raised the question of supplemental briefing, I didn't ask for it as much as you posed that it is something you wanted. I don't know to what extent the whole question of defaulted securities represents an issue that I'm going to be paying much attention to in deciding this. Nor do I know whether or not judicial admissions versus parol evidence, another subject that you had said you wanted to address, is a matter of any significance to the overall decision to be made here. But if you want to submit something, I think you should have the opportunity to do that and it should happen within the next week.

Now, I guess I have another process question, which is really addressed to Mr. Miller and his team. What has to happen by October 2nd?

MR. MILLER: Ralph Miller, Your Honor, to respond to your question. I'm advised by my colleagues that what needs to happen is first of all there would need to be a finding that this was an assumable executory contract because at the moment there is considerable doubt about that. If that occurs, very quickly thereafter we would try to activate, on the shortest notice possible, the remainder of our pending motion to assume and assign.

If that can be achieved with Deutsche Bank within the

option period the fact that there may be appeals does not present a problem that the assignment provides that any money that is received or payments that are made during an appellate process will essentially be escrowed and will await the outcome of appeals.

So the goal would be to try to get a trial court resolution of this issue, which was submitted by summary judgment, cross summary judgments actually. And then if that issue were resolved as LBSF and LBHI believe it should be under this record to find that this is an executory contract it's assumable and assignable, we would come back with a separate hearing to see if anybody has any opposition to the actual assumption and assignment. And that could be done, we think, on shortened notice if necessary. If that happens and the trial court level then the deal is done with Deutsche Bank, it becomes operative and everything else can play out on appeal if necessary.

THE COURT: Is that correct?

MR. MILLER: I believe that's correct, Your Honor.

THE COURT: Okay. If LBSF wishes to submit something in response to whatever Libra submits on the supplemental briefing that they've requested, that's obviously something that LBSF has the right to do and I assume it will be done as promptly as is physically and humanly possible. Although I suppose you could also say never mind we don't think anything

they've said matters and we give up that right and you'll make your own decision on that; only because I don't want to be burdened with a lot more papers and the Libra papers have been, at least in my estimation, quite extensive and very well prepared. It would be helpful if whatever is submitted is not only well prepared but extraordinarily concise, because I don't want to read very much more than is really necessary at this point.

The argument and the presentations on both sides were outstanding and I'll take this under submission, recognizing that there is a very tight deadline that applies to this.

THE COURT: Without suggesting by this comment that there may be a need for some additional time on my part, I am simply going to make the observation of my situation briefly. I have a lot on my plate at the moment, and a lot of what I have on my plate is happening in the next month. That's not a complaint, it's just a statement of condition. And, regrettably, one of the most pressing matters that I have, unrelated to LBHI or this very intriguing controversy that we've been talking about today, is a matter that requires determination by no later than September 30th. It's a matter of enormous size and complexity and has been pending in this Court since July 20th, which explains the equipment which surrounds you. I simply point out that it may be difficult for me to make the deadline that you have established, although I

do everything in my power to do that.

Conceivably, what may be required as a result is something that is less than the fully developed forty-five page footnoted decision which this controversy probably deserves. It might be, in the interest of time, simply my decision, with the reasons for that decision being explained in a bench decision on a date that I will have to identify at some point between now and the end of September. I'm simply musing on this to let you know that I want to deal with the realities of the case, but I also have to deal with the realities of the other demands that I have on my physical ability to get this done.

To complicate matters, September is also the time when law clerks turn over. So that's just to tell you that there may be some practical implications here that we're going to have to address. And you'll hear from me, if I don't hear from you first, as to what we're going to do about this.

I expect that the most appropriate time for me to hear from you is in the submission of supplemental briefing within the next week, and the most appropriate time for you to hear from me is after I've concluded how I'm going to decide this and when I'm going to be able to decide it. And that will be sometime before the next omnibus hearing. Or, perhaps, at the next omnibus hearing, which, conveniently, is September 15th.

Now, we need to deal with unclaimed property, to the

extent that's still an active matter for discussion.

(Off the record from 2:44 p.m. to 2:46 p.m.)

MR. MILLER: Thank you for your time, Your Honor.

THE COURT: Thank you, Mr. Miller. Mr. Wiltenburg, what's going on here?

MR. BATISTA: Well, we weren't able to resolve it, Judge. And I think we're --

THE COURT: Well, what --

MR. BATISTA: -- in agreement, unfortunately, that we should go ahead with the hearing that the Court outlined on June 3rd as to whether or not this is an executory contract. Our position is that it is not. Mr. Gelb is here and will testify if Your Honor permits. I think it will take twenty minutes, and the Court asked the question on June 3rd as to what UPRS did, what Mr. Gelb did in order to make the claim to the State of New York for unclaimed property that we now know has resulted in a 5 or 6 million dollar recovery.

THE COURT: Mr. Batista, here's my problem. And I think you're aware that I have been on the bench since 10 o'clock this morning.

MR. BATISTA: Absolutely, Judge.

THE COURT: What you're not aware of is that I've been involved in a trial on both Monday and Tuesday of this week, and then I have a calendar tomorrow.

MR. BATISTA: I have no idea how you do this, Judge.

THE COURT: Well, that's not the point. The point is that I don't think I'm in a position to hear you at this point in the day. It's not that I'm physically incapable of it, but I'm, at this moment, with the Lehman docket being as contested as it was today, including a contest on ADR procedures, a contest on international law relating to the application of the automatic stay to a bankruptcy which is pending in the District Court in Tokyo, and the argument that just transpired that I think you saw, which is a very highly technical matter of contract interpretation. I think it's going to be difficult for me to be mentally alert enough to deal responsibly with the issues that you want to present. It had been my hope when I saw you walk in that you'd been able to work this out. And I don't mean to delve into your settlement discussions, and I'm not going to, but Mr. Wiltenburg said when this case was first called at 2 o'clock that from the perspective of his client he thought it might not matter, at least in terms of the economics of what we're dealing with, whether the contract in question is deemed to be executory or non-executory.

At the last hearing that we had in June I focused on the executory nature of the contract, in part because there was an issue at the time of rejection, the trustee having elected to reject the contract. I believe that you took the position on behalf of your client that there was no performance that needed to be performed on his part, such that the contract was,

for all practical purposes, fully performed and not executory for purposes of the rejection notice that had been issued by the trustee.

It seemed at the time that that was a matter that the parties cared about. Even if you weren't able to resolve the claim issue do the parties, at this juncture, care about the determination of the question of whether the contract that underlies the work of your client is or is not executory for present purposes? If it's not a matter of importance we don't need a hearing. If it is a matter of importance, and if it's to be a contested matter that will have some significance to the case, I suggest that we reschedule it. But I don't understand why this is a problem.

MR. BATISTA: Oh, we think the record that we have already indicates that this is not an executory contract, that UPRS performed every substantial act it needed to perform prior to the September of 2008 filing, and that all that remains to happen, not to be done, but all that remains to happen is for the State of New York to pay the 5 to 6 million dollars in unclaimed funds that will be paid for one reason only, which is the presentation of the claim that my client made prior to September. Now, if Mr. Wiltenburg wants to stipulate that all that work was done and that it is not an executory contract, well, I'm sure we'll -- well, we don't want to go through the exercise of a hearing to reach that conclusion.

THE COURT: Well, it's obvious from what I've already seen pre-submitted by the trustee that there are any number of issues that can be presented as part of a hearing if the parties can't reach an agreement, including issues of credibility and documents that may have been submitted in incomplete form, and, I mean, this is a controversy that has, pardon my use of the term, an ugly side to it. And I don't know whether or not, as we open this up for what is claimed to be a twenty minute proceeding, that it's going to turn out to be a two hour proceeding. And, in part, because what I've already seen in the supplemental submission of the trustee raises questions as to whether this is or is not executory and whether or not there was performance that needed to be done post-petition, whether or not there were acts of further contact with the state.

All of this is out there. If the parties could stipulate to facts that would be easy.

MR. BATISTA: Can I address that, Your Honor?

THE COURT: Well, Mr. Wiltenburg was raising his finger first.

MR. BATISTA: I'm sorry.

MR. WILTENBURG: Your Honor, if I may, the perception that I was trying to share earlier today was that the executory/non-executory question which we think comes out the way we contend, answering it may not really get us that much

closer to resolution of the bigger question of what the entitlement is, because if it was, as is contended, a debt that was owing on the filing date, it's a pre-petition unsecured claim. If it was an executory contract that was rejected rejection damages are a pre-petition unsecured claim. So you get about to the same place.

THE COURT: Not necessarily, if there's post-petition activity that elevates the claim to administrative status.

MR. WILTENBURG: Yes, and that would be an inquiry that's not really teed up today.

THE COURT: So without going into the specifics of your discussion about quantum of claim, because that's not really a matter that I need concern myself with at this moment, why do we need to have an evidentiary record at all if you're prepared to, in effect, stipulate that it doesn't matter what the status is of the contract other than the fact that if it's deemed to be non-executory you're not going to reject it?

MR. WILTENBURG: Yes. It's the position of the claimant that nothing substantial happened after the filing date. Probably nothing happened that really contributed benefit to the estate, but they say nothing at all happened of significance. So, you know, against the background of that contention it's hard to see where there's going to be a significant administrative claim.

THE COURT: Are you prepared to stipulate that it's

not executory? Because that's Mr. Batista's position. It's not executory. Everything was done already. If everything was done already it's hard for him to prove an administrative claim. It seems like it's the perfect position for you to be in.

MR. WILTENBURG: I guess we can stipulate to that. I've got to talk to my client, but --

THE COURT: And that means there's no rejection of the contract, and there is a claim associated with the ten percent collection fee that the firm earns once the money arrives in your hands.

MR. WILTENBURG: Yes. And, Your Honor, our position is that's a pre-petition claim, and we were talking about fixing and allowing the amount.

THE COURT: I don't want to get into the middle of that. And if you haven't been able to reach an agreement on the amount of that claim maybe you can do it between now and whenever we see each other again. But I don't think we need a hearing on this if after conferring with your client you can agree with Mr. Batista's legal position. Then I don't need to hear any evidence. And all of this argument about misleading documents, that all goes away.

MR. WILTENBURG: Agreed.

MR. BATISTA: May I just comment on that, Judge, because I don't want to leave the record unclear? I think that

at the outset of our time today the document on which the trustee's claim was based that there was something misleading about my client's position was withdrawn. In effect, they had attached to their papers --

THE COURT: That's what the letter was about?

MR. BATISTA: That's what --

MR. WILTENBURG: Yes, Yes. Your Honor, I had --

MR. BATISTA: Those were contacts by my client with the State of New York for other clients of his company.

THE COURT: Okay.

MR. WILTENBURG: Your Honor, I had doubts about the inference we drew from that and, accordingly, withdrew that exhibit via the letter.

THE COURT: Look, you --

MR. BATISTA: I just wanted the record to be clear.

THE COURT: Here's where I think you should end up. That doesn't mean that you will end up there. I think you should work out a stipulation. I think the stipulation should resolve the contested matter that brings you back in court today, that it should be one that either deems the contract in question to be non-executory, which is how we've been discussing it lately, or executory. If it doesn't matter to the trustee but it matters to unclaimed property, and unclaimed property would prefer that it be deemed non-executory, why not simply agree to that? I'm not directing anybody to do that.

That just seems like an easy default.

MR. WILTENBURG: We'll work on that, Your Honor.

THE COURT: If you can stipulate that the agreement is non-executory, then to the extent that there was a notice to reject as of sometime in June that should be deemed annulled or voided so that the contract exists in full force and effect. To the extent there are claims to be asserted against the LBI estate those claims are governed by the existing contract.

MR. WILTENBURG: Your Honor, I hate to quibble on a point, but this being a liquidation contracts are sort of rejected by operation of law if they're not assumed. There is no way we're going to assume that. So, you know, we're not going to deem it to be --

THE COURT: I'm not deeming it to be assumed. As I understand the procedural posture of the case, and I raised this when we had our hearing on June 3rd, I couldn't tell where the trustee was on rejection. It seemed to me that you had made an election to specifically reject this contract and that the election was made right at the time that they were making their claim for 500,000 dollars for producing value to the estate that you didn't even know about. So part of what gives this little tempest in a teapot a bad aroma on both sides is that it doesn't seem as if you gentlemen are working constructively to get to the right outcome, which is a practical outcome that avoids unnecessary litigation,

unnecessary administrative expense, unnecessary court time, and, frankly, more smoke than is necessary. I am, frankly, disappointed that the trustee has been unable to resolve what should be a fairly concise and simple dispute. That's how I saw it last time. That's how I see it now. And I'm, frankly, angry. Get it done, please. I'll see you next time on this if there is a next time.

IN UNISON: Thank you, Your Honor.

(Proceedings concluded at 5:25 PM)

I N D E X

R U L I N G S

C E R T I F I C A T I O N

I, Clara Rubin, certify that the foregoing transcript is a true and accurate record of the proceedings.

Clara Rubin

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Clara Rubin

AAERT Certified Electronic Transcriber (CET**D-491)

Also transcribed by: Penina Wolicki

Veritext LLC

200 Old Country Road

Suite 580

Mineola, NY 11501

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